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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Pro se for Petitioner

August 10, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Norman A. Landry, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on February 7, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A to this Petition. It is reported at 473 F.2d 365 (1973).

JURISDICTION

The judgement of the United States Court of Appeals for the First Circuit was entered on February 7, 1973 (Appendix B). A timely petition for rehearing was denied on March 13, 1973, twenty one days after its filing (Appendix C). On May 30, 1973 the Honorable William J. Brennen, Jr., Associate Justice of the Supreme Court of the United States, signed an order extending the time for filing this petition for writ of certiorari to and including August 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The case involves the violation by the defendants of the anti-fraud provisions and margin requirements of the Federal securities laws, namely, Section 17(a) of the Securities Act of 1933, 48 Stat. 84; 15 U.S.C. § 77q and Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891; 15 U.S.C. § 78j and Rule 10b-5 promulgated thereunder and Section 7 of the Securities Exchange Act of 1934, 48 Stat. 886; 15 U.S.C. § 78q and provisions of Regulation T promulgated thereunder. There is also involved violations of the Rules of the New York Stock Exchange and Rules promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934.

The questions thereby arising are:

1. Whether or not it was proper for the Court of Appeals for the First Circuit to render a decision in conflict with a decision of the Court of Appeals for the Second Circuit on the same matter.

As an example: In the case of United States of America v. Philip Peltz, United States Court of Appeals, Second Circuit, 433 F.2d 48, cert. denied 91 S.Ct. 974, the customer was convicted for misrepresenting that his sales of stock were "long" when in fact they were "short". The court in that case said that the misrepresentations constituted violations of § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

By analogy the defendants in this case misrepresented to the petitioner, and therefore violated g 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder by fowarding to the petitioner monthly statements and confirmation slips which showed (14) securities transactions being effected as "long" sales when in fact they were "short" sales. Mr. Joseph Shwartz from the S.E,C. testified (Tr. 459)* that the defendant broker treated securities transactions as "long" sales which the broker should have treated as "short" sales. The District Court refused to instruct the jury on petitioner's requested instructions on the Securities and Exchange Commission Rules applicable to the trial evidence (A timely objection was made to the District Court ruling) and the District Court refused petitioner's request to submit to the jury a seperate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against petitioner in violation of g 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The Court of Appeals upheld the District Court's actions.

2. Whether or not it was proper for the Court of Appeals for the First Circuit to render a decision in conflict with a decision of the Court of Appeals for the Seventh Circuit on the same matter

* In essence, questions and answers combined, transcript of trial proceedings

As an example: In the case of Buttrey v. Merrill Lynch, Fenner & Smith, Inc., United States Court of Appeals, Seventh Circuit, 410 F.2d 135 (1969), cert. denied 396 U.S. 838, the court in that case found that a private action lies for violations of Securities Act and Securities Exchange Act and Rule 10b-5 when the broker violated a Rule of the New York Stock Exchange when such Rule is to protect the public.

There was evidence, at the trial, by the defendants that defendant Murphy was effecting securities transactions in petitioner's account and was receiving commissions when, in fact, defendant Murphy was not a registered representative. Petitioner's allegations in his complaint was confirmed by the evidence, at the trial, which indicated that defendant Murphy was effecting securities transactions in petitioner's account when he was not a registered representative authorized by the Rules of the New York Stock Exchange to handle customers' stock brokerage accounts, and had not even taken the training course and examination prescribed by defendant brokerage firm and the New York Stock Exchange as requirements for registration as a registered representative. The petitioner testified that he was not aware that defendant Murphy was not a registered representative.

The District Court refused to instruct the jury on petitioner's requested instructions

on New York Stock Exchange Rules applicable to the trial evidence (Rule 345, Rule 401, Rule 431, which Rules are to protect the public)and a timely objection was made, at the trial, to the District Court's rulings and the Court of Appeals rejected petitioner's issues without discussion.

The District Court refused petitioner's request to submit to the jury a seperate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against petitioner prohibited by § 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The Court of Appeals upheld District Court's action.

3. Whether or not it was proper for the Court of Appeals for the First Circuit to decide a federal question in a way in conflict with applicable decisions of this Court.

See: J. I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423, the Supreme Court impliedly authorized by the Securities Exchange Act of 1934 (p. 432, 84 S.Ct. at p. 1560). See also Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 and Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966) and Tcherepnin v. Knight, 389 U.S. 332 (1967).

4. Whether or not the Court of Appeals for the First Circuit has sanctioned the departure by the lower court from the accepted and usual course of judicial pro-

ceedings so as to call for an exercise of this Court's power of supervision.

5. Whether or not there was a conspiracy to deny the petitioner a just, speedy and inexpensive determination of his action (obstruction of justice) which denied petitioner due process of law and equal protection of the laws under the Fourteenth Amendment.

6. Whether or not there was a conspiracy to conceal violations by the defendants which violations are considered to be criminal in nature.

7. Whether or not the District Court action was proper by ordering that the LOSS column on Plaintiff's Exhibit 11-A, 11-B, and 11-C be removed and marked for Identification after petitioner had testified and indicated to the jury figures that appeared in the LOSS column of petitioner's exhibit. This LOSS column indicated the monetary damages which resulted from defendants violations. The Court of Appeals rejected petitioner's issue without discussion.

8. Whether or not the District Court action (Tr. 1142) was proper by ordering the jury to disregards the reference to notations on Plaintiff's Exhibit 11-A, 11-B, and 11-C which indicated the relationship of securities transactions after petitioner had testified in great length about these notations before the jury.

9. Whether or not a private civil action for damages lies for violation of the anti-fraud provisions, namely, Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

10. Whether or not a private civil action for damages for violations of New York Stock Exchange Rules (Where said Rules is to protect the public) are actionable under the anti-fraud provisions of the Securities Act and Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

11. Whether or not it was proper for the District Court in refusing to instruct the jury on petitioner's requested instructions in regards to the New York Stock Exchange Rules applicable to the trial evidence (Where said Rules are for the protection of the public). A timely objection was made, at the trial, to the ruling of the District Court. The Court of Appeals rejected petitioner's issue without discussion.

12. Whether or not a private civil action for damages for violations of Securities and Exchange Commission Rules are actionable under the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

13. Whether or not it was proper for the District Court in refusing to instruct the jury on petitioner's requested instructions in regards to the Securities and Exchange

Commission Rules applicable to the trial evidence. There was a timely objection made, at the trial, to the ruling of the District Court. The Court of Appeals rejected petitioner's issue without discussion.

14. Whether or not Section 29(b) of the Securities Exchange Act of 1934, 48 Stat. 903; 15 U.S.C. § 78cc states in essence that every contract made in violation of or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder shall be void and therefore implies that rescission may be recovered against the violator.

15. Whether or not it was proper for the District Court in sustaining objection by the defendants which prevented the petitioner from testifying, before the jury, pertaining to rescission aspect of the case (Tr. 171 - Offer of Proof Made of $150,000). The Court of Appeals rejected petitioner's issue without discussion.

16. Whether or not the action of the District Court was proper in not allowing petitioner's witness, Mr. Thomas J. Staiti, Certified Public Accountant, to testify before the jury in regards to the total losses sustained by the petitioner in his account. (Tr. 582, 588-589 Offer of Proof made and Plaintiff's Exhibit 42 marked for Identification). The Court of Appeals rejected petitioner's issue without discussion.

17. Whether or not the District Court action was proper in refusing to instruct the jury on petitioner's request that punitive damages are allowable in an action for violation of Rule 10b-5 (Where aggravated scienter is clearly shown by the facts and where defendants wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime) (See: deHass v. Empire Petroleum Co. 302 F. Supp. 647). The Court of Appeals rejected petitioner's issue without discussion.

18. Whether or not the District Court action was proper, in instructing the jury the matter of the direction of the verdict as far as Regulation T is concerned against defendants Mr. Murphy and Mr. Winchester (Dismissal of individual defendants) when the evidence clearly indicated that defendants Winchester and Murphy were personally responsible for maintaining plaintiff's margin account, and where the evidence showed that they had actual knowledge of violations of Regulation T. A timely objection was made, at the trial, to the ruling of the District Court. The Court of Appeals upheld the action of the District Court.

19. Whether or not the District Court action was proper, in regards to the "churning" claim, in refusing to instruct the jury on petitioner's requested instructions which would have had the effect of making all of the defendants liable jointly and severally to the same extent for violating the Exchange Act, which instructions would have been in conformity with Section 20(a) of

the Securities Exchange Act of 1934, 48 Stat. 899; 15 U.S.C. § 78t. At the trial, there was a timely objection made to the District Court ruling. The Court of Appeals did not reply to the issues raised by the petitioner. (During the trial, the defendants on two occasions made a motion for directed verdict on "churning" claim, which was denied. The jury did, in fact, find the defendants guilty of "churning" petitioner's account and assessed different amount of damages to each of the three defendants which totalled $6,500 and the District Court subsequently granted defendants motion for judgement notwithstanding the verdict because the District Court (A 250d)* had reservations as to whether the defendants should be liable jointly or severally for the amount of $6,500).

20. Whether or not the action of the District Court in denying petitioner's motion to amend his complaint constituted an abuse of the District Court's discretion. The Court of Appeals rejected petitioner's issue without discussion.

21. Whether or not the action of the District Court in denying petitioner's motion requesting reference to special master under Rule 53 (With supporting Affidavit and documents attached thereto) was prejudicial to the petitioner. The Court of Appeals rejected petitioner's issue without discussion.

* Reference to pages of petitioner's Appendix before the Court of Appeals, certified to this Court.

22. Whether or not the action of the District Court was proper in denying petitioner's motion that defendants Affidavit filed with the court were presented in bad faith and that defendants and defendants attorney should be adjudged guilty of contempt. The Court of Appeals rejected petitioner's issue without discussion.

23. Whether or not it was proper for the District Court to order, during the course of the trial, the manner by which losses were to be computed in petitioner's account when the District Court knew that by said order it would result in presenting losses to the jury which were not reflected in petitioner's account with defendant brokerage firm.

24. Whether or not the action of the District Court was proper in denying petitioner's motion for summary judgement. The Court of Appeals rejected petitioner's issue without discussion.

25. Whether or not the defendants and defendants attorneys were continuing to engage in a course of business which would act as a fraud by filing an appeal with the Court of Appeals which willfully misrepresented the facts. Petitioner filed a Reply Brief which clearly indicated that the defendants appeal was frivolous and petitioner requested to be awarded just damages. (Petitioner's Reply Brief should be presently on file with the U. S. Supreme Court)

26. Whether or not the District Court should have entered judgement notwithstanding the verdict in behalf of petitioner after the Court was informed of a case where judgement notwithstanding the verdict was entered by a Court without the party filing a motion.

27. Whether or not a Regulation T violation in a margin account violates the customers margin agreement.

CONSTITUTIONAL PROVISIONS INVOLVED:
Constitution of the United States:
Amendment XIV, § 1:
"..nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATUTES:
Federal Statutes:
The following are set forth in Appendix E; Page

Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g, 48 Stat. 886 126
Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, 48 Stat. 891 130
Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q, 48 Stat. 84 131
Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t, 48 Stat. 899 132
Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc, 48 Stat. 903 133

The following are set forth in Appendix E;

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Rule 10a-1 134
Rule 10a-2 137
Regulation T (12 CFR 220):
Section 220.3(g) 139
Release No. 1571, Relative to
Rule 10a-1 and Rule 10a-2 140
Rules of New York Stock Exchange:
Rule 345
Rule 401
Rule 405 141
Rule 431 142

STATEMENT OF THE CASE

Petitioner instituted this action in the United States District Court for the District of Massachusetts by filing a Complaint on June 3, 1964 (A 5)*.

In 1964, depositions were taken of defendant Philip J. Murphy and petitioner.

Defendant Philip J. Murphy testified on deposition, indicated deposition Page 56, 65, 76-77, 86-87, 122, 128-129, 137-138-139, 152 and 187, that defendant Philip J. Murphy was executing securities transactions in petitioner's account prior to defendant Philip J. Murphy becoming registered with and being accepted by the New York Stock Exchange. Petitioner testified on deposition, indicated deposition Page 296-297, that defendant Philip J. Murphy never informed petitioner that he was not a registered representative.

An Affidavit was filed by defendant Walter Winchester, office manager for defendant brokerage firm, on Mar. 5, 1965. Defendant Walter Winchesters' Affidavit indicates on Page 2, Paragraph 4, that he approved orders that were entered by defendant Philip J. Murphy after July 1962 and that according to their records, defendant Philip J. Murphy shared commission credit on these transactions and the Affidavit further indicates on Page 3, Paragraph 8, that defendant Philip J. Murphy became registered on or about November 21, 1962.

* The letter A followed by numerals in parenthesis, refer to pages of the record Appendix before the Court of Appeals, certified to this Court

Rule 345(a)(1) of the New York Stock Exchange states, "No member or member organization shall permit any person to perform regularly the duties customarily performed by a registered representative, unless such person shall have been registered with and is acceptable to the Exchange."

Defendant Philip J. Murphy testified on deposition, indicated deposition Page 313-314-315, 377, and 378, that he informed the petitioner that when petitioner's account was simultaneously long and short the same security, that the same security could be sold as a regular long sale in petitioner's account. Petitioner testified on deposition, indicated deposition Page 122-123-124, that these transactions were too complicated for him to understand.

During the trial, Mr. Joseph Shwartz, from the United States Securities and Exchange Commission testified (Tr. 458-459)**, that the manner in which securities transactions, as described above, were treated by the broker resulted in a violation as when there was a short sale in petitioner's account and then a purchase of the same security, the next sale of such security must be treated as a short sale and margin required and that the broker treated it as a long sale.

** The letter Tr. followed by numerals in parenthesis, refer to pages of the trial transcript which was before the Court of Appeals and certified to this Court

In the booklet entitled, "Compilation Of Releases, Dealing With Matters Arising Under The Securities Exchange Act of 1934 and Investment Advisers Act of 1940, March 1968" distributed by the United States Securities and Exchange Commission, Page 2, which has reference to the Securities and Exchange Commission promulgated Rules 10a-1 and 10a-2 states (in part), "Within the meaning of the rules a person "owns" securities only to the extent that he has a net long position in such securities. Thus, if a person maintains two accounts and is short 1000 shares of a security in one and long 1000 shares of the same security in another, any sales of such security by such person are "short sales" and are subject to the provisions of the rules."

Petitioner's attorneys filed (A 6) on Feb. 4, 1966, Pltff.'s Request for Admissions Under Rule 36 and on Mar. 28, 1966, Pltff.'s Second Request for Admissions Under Rule 36.

At a hearing held on June 13, 1968 (Transcript on file with this Court - Page 8 to Page 11), petitioner informed the District Court that the Plaintiff's Request for Admissions filed by plaintiff's attorneys were sham and that petitioner's attorneys were aware of this and that it was done to prevent petitioner from having a just trial. The statements contained in Plaintiff's Request for Admissions conflicted with answers contained in documents which petitioner's attorneys had previously filed with the court, namely, Pltff.'s response to notice under Rule 36 for the

admission of certian relevant matters and Pltff.'s response to second notice under Rule 36 for the admission of relevant matters. Subsequently, in 1970, petitioner informed the District Court (A 212c) orally and by motions that Pltff.'s Request for Admissions under Rule 36 were filed without his knowledge or consent and that the materials contained therein were false.

Petitioner's attorneys requested petitioner (A 83) to sign a document entitled, "Plaintiff's Further Response To Notice Under Rule 36 For Admissions Of Certain Relevant Matters." Petitioner refused to sign this document because petitioner stated that the statements contained therein were contrary to the facts. Petitioner's attorneys filed a motion for withdrawal of appearance on Oct. 10, 1966 (A 7) and on the same day the District Court allowed the withdrawal.

Petitioner had no knowledge, at the time, that petitioner's attorneys filed with the court on Feb. 4, 1966 and March 28, 1966, Pltff.'s Requests for Admissions Under Rule 36, which was done in spite of the correspondence that petitioner received from his attorneys dated June 5, 1964, which stated, in part, "I will keep you informed and will consult with you when actions involving you are taken."

Petitioner's own attorneys were conspiring against him by filing documents with the court which they knew contained statements contrary to the facts and was an attempt to conceal the defendants

violations which are considered to be criminal offences.

Petitioner had nine postponments of trial dates with his first attorneys. On most postponments, they came on the eve of the trial. According to the District Court Docket (A 6), on Feb. 14, 1966, the case was assigned for trial the week of 4/11/66. The court docket does not show any continuances.

On Oct. 14, 1966 at 10:45 A.M. the petitioner telephoned Francis J. Ahern, Deputy Clerk for District Judge W. Arthur Garrity, Jr.. Mr. Ahern stated to the petitioner that petitioner's case would be heard in November 1966 as Mr. Ahern had received a directive from Washington that stated that all 1964 cases had to be tried before the end of the year.

Petitioner (A 83) engaged other attorneys, and these attorneys gave petitioner documents which they said were filed in court by the defendants entitled, "Compendium Of Notices To Admit Facts And Answers" which was dated 1/26/67 and the statements contained in this document had references to Plaintiff's Further Response.

Subsequently, petitioner's attorneys demanded that petitioner sign this document or they would withdraw from the case. Petitioner refused to sign this Compendium because petitioner stated that the statements contained therein were contrary to the facts. These attorneys filed a withdrawal from the case, which petitioner made an objection. A conference was

held on Jan. 11, 1968 (Transcript on file with this Court) in regards to the withdrawal of petitioner's attorneys. At the conference, petitioner informed the District Court (Page 4-5)*** that he had repeatedly requested a fast and speedy trial from his attorneys and that he had numerous trial dates which were postponed (Said numerous trial dates are not indicated on court docket). Petitioner informed the District Court that most all of the postponments occured a day prior to the trial.

Petitioner informed the District Court that he had five postponments of trial dates with his present attorneys. Petitioner informed the District Court that the numerous postponments and the tremendous harassments that petitioner was subjected to has adversely effected his health, for which petitioner was hospitalized twice, the first time petitioner almost lost his life. Petitioner informed the District Court that this matter has also effected his family and work. Petitioner informed the District Court (Page 7) that he had an agreement with his first attorneys which was unconscionable. Petitioner informed the District Court (Page 11) that he was having a very difficult time of getting

*** The word Page followed by numerals in parenthesis, refer to pages in transcript of hearings on said dates. Said transcripts have been transmitted to this Court

justice and having his case tried and that it seemed that this matter has been suppressed purposely to keep others from coming forth. Petitioner informed the District Court (Page 5) that he had already expended $9,500 in attorneys fees, not including other expenditures that petitioner has made. Petitioner's attorneys informed the District Court (Page 28) that the testimony from the Federal Reserve Board would not help the petitioner, it would hurt the petitioner. Petitioner's attorneys informed the District Court (Page 27) that there was very little the SEC could contribute to the case. Petitioner's attorneys informed the District Court (Page 22) that because petitioner had written to the SEC and to his Senator, that the expert from the SEC will no longer testify. The petitioner informed the District Court (Page 24) that he was informed by the SEC that they authorized an expert from the SEC to testify and that petitioner was never informed by the SEC that they had withdrawn the authorization of their expert to testify. As indicated by the records (Tr. 386 to 511), the expert from the SEC did, in fact, testify at the trial. Petitioner informed the District Court (Page 30) that he objected to the withdrawal of his attorneys. Petitioner informed the District Court (Page 11) that he didn't think that justice will be fulfilled by his attorneys being allowed to be discharged from the case. The petitioner had informed the District Court (Page 39) that a brief was supposed to have been filed by petitioner's

attorneys on November 20th, which petitioner's attorneys never filed.

The District Court allowed petitioner's attorneys to withdraw, even though the court docket indicated that there were already three pretrial hearings and an assignment for trial and that on Nov. 13, 1967 the District Court ordered petitioner's attorneys (A 7) to file a brief by Nov. 20, 1967. Petitioner's attorneys never filed any brief and the District Court allowed petitioner's attorneys to withdraw on Jan. 11, 1968. The District Court informed the petitioner (Page 36) that the case would be called for trial on Feb. 26, 1968.

Petitioner filed his appearance, Pro se, with the district court. On Feb. 15, 1968 the petitioner, filed a motion, Pro se for summary judgement with supporting Affidavit. On May 13, 1968 a hearing was held on petitioner's motion for summary judgement. A transcript of these proceedings is on file with this Court. During said hearing, petitioner stated to the District Court (Page 13), "Defendants nowhere in their motion in opposition to plaintiff's motion for summary judgement deny any misrepresentations by the defendants."

Even though there was no genuine issue as to any material fact, in regards to the misrepresentations, the District Court denied petitioner's motion for summary judgement.

At a hearing held on June 13, 1968 (Transcript on file with this Court), defendants attorney informed the District

Court (Page 12, 17) that the compendium of notices prepared by the defendants was done with and to the satisfaction of plaintiff's former counsel and that they actually came to an agreement with defendants compendium. Petitioner informed the District Court (Page 13) that the compendium is totally false. Petitioner informed the District Court that if he had signed the compendium it would have relieved the brokerage firm of some of the charges that were made, would have relieved the defendants of their affidavits that were submitted in bad faith, which were actually perjured testimony and it would have protected petitioner's attorneys from some of the documents, under Rule 36, that they had submitted to the court. Petitioner informed the District Court (Page 32) that this matter had taken a tremendous amount from his health. Petitioner testified (Tr. 135) that he subsequently became disabled.

Even though no Compendium had been filed with the court, on June 13, 1968, the District Court issued the following order (A 8) to the petitioner, when petitioner was Pro se, "Plaintiff shall file a response to the compendium of notices dated November 8, 1967, either admitting or denying the facts stated therein and, with respect to denials, stating insofar as possible the pertinent facts believed to be true by the Plaintiff." The District Court ordered petitioner, when petitioner was Pro se,to file this response on or before July 15, 1968.

Petitioner, filed the response, Pro se on July 15, 1968 (A 83 to 123) to, "Compendium of Notices to Admit Facts and Answers" and petitioner attached Exhibits thereto and also included the Compendium itself.

As indicated by the record on file, enormous pressure was used by the District Court to try to get the petitioner to change his responses to the Compendium to Admit Facts and Answers, which was filed with the court on July 15, 1968. This pressure is indicated in the transcript which is on file with this Court of the Pre-trial Conference held on October 29, 1970. The District Court stated (Page 33-34), "We think that some of those responses may be modified and some perhaps withdrawn" "I just feel that we can take a giant step forward if such a supplemental pleading is filed" "you can say that we do not vary from it and we are going to try the case for two months instead of for two weeks."

At a Pretrial Conference held on December 17, 1970 (Transcript on file with this Court), the District Court stated (Page 13), "I have felt that at least portions of the compendium could be agreed to without any conceivable prejudice to the plaintiff, and indeed to his advantage." Petitioner stated, during the trial, to the District Court (Tr. 670), "--- and if I had signed that document, I think you know full well my case wouldn't be here today."

Petitioner filed motion, Pro se, on August 2, 1968 (A 8) which was, "Plaintiff's Interrogatories to Defendant Hemphill, Noyes & Co. under Rule 33".

Defendants filed a motion objecting to plaintiff's interrogatories. On Oct. 3, 1968 the petitioner sent a letter to Francis J. Ahern, Clerk, for the Hon. W. Arthur Garrity, Jr. requesting a hearing be held at the earliest practical time on said motions in accordance with Rule 33 of the Rules of Civil Procedure for the United States District Courts.

Petitioner sent another letter to the court on Oct. 9, 1968 requesting that motions be resolved.

Petitioner filed a motion (A 136-137) on Nov. 8, 1968 requesting that pending motions be resolved and petitioner attached to said motion a supporting memo from petitioner's doctor.

The petitioner sent letters to the Hon. W. Arthur Garrity, Jr., on Nov. 21, 1968, Mar. 4, 1969, July 14, 1969, Sept. 2, 1969, and Nov. 10, 1969, begging the Courts indulgence for decision or hearing on motions that had been previously filed.

The motions were not heard by the Court until Sept. 28, 1970, over two years had elapsed from the time of filing the motions.

Defendants did not answer all of the plaintiff's interrogatories, as the defendants selected the interrogatories that they wished to answer.

Petitioner's attorneys filed (A 10), on Oct. 5, 1970, "Notice of Intention to Press for Answers to Previously filed Interrogatories".

According to the entry made in the court docket (A 10) and the transcript of the proceeding on file, they indicate that petitioner's attorneys withdrew the balance of plaintiff's interrogatories in open court on Oct. 29, 1970. Petitioner had waited over two years for the answers to his interrogatories.

At a conference held on December 17, 1970 (Transcript on file with this Court), the petitioner informed the District Court (Page 5) that petitioner's attorneys had promised to press for the interrogations, and the petitioner's attorneys withdrew the motion. Shortly after petitioner's attorney withdrew the motion to press defendants for answers to petitioner's interrogatories, petitioner's attorneys filed a motion (A 11) to withdraw from the case which was subsequently denied.

The statement made by the District Court at a hearing held on June 13, 1968 (Transcript on file with this Court, Page 25) indicated to the petitioner the need for a Master. Petitioner, on Oct. 11, 1968, filed a motion Pro se (A 124 to 135), "Plaintiff's Motion Requesting Reference to Special Master Under Rule 53 with Supporting Affidavit and Documents". Almost two years later, on Oct. 8, 1970, the District Court (A 212e) denied petitioner's motion for a Master. The action of the District Court in denying petitioner's motion for a Master was prejudicial as the damages presented to the jury for their deliberation were not factual losses and did not agree with

the two audits made by Certified Public Accountants, which audits were attached to Plaintiff's Motion For Master.

On Nov. 8, 1968, the petitioner, filed a motion, Pro se, to amend his complaint (A 139 to 150) and attached thereto the amended complaint and almost two years later, on Oct. 8, 1970, the District Court (A 212d) denied the motion. The District Court abused its discretion when the District Court denied petitioner's motion to amend his complaint, as the amended complaint conformed to the evidence. The amended complaint contained additional allegations of violations of Rules of New York Stock Exchange, including New York Stock Exchange Rule 405 and the District Court's attention was directed to Buttrey versus Merrill Lynch, Pierce, Fenner & Smith, Incorporated (C.A.Ind.1969, 410 F.2d 135, certiorari denied 90 S.Ct. 98, 396 U.S. 838, 24 L.Ed.2d 88) the court in said case found that a private action lies for violations of Securities Act and the Securities Exchange Act and Rule 10b-5 when the broker violated a Rule of the New York Stock Exchange when such Rule is to protect the public. The amended complaint, which was denied, also demanded rescission. Under Section 29(b) of the Securities Exchange Act of 1934 states, in essence, that every contract made in violation of any provision of this title or any rule or regulation thereunder, shall be void and implies that rescission may be recovered against the broker (Warshow v. H. Hentz & Co., 199F. Sup. 581). The amended complaint, which was

denied, also alleged violations of Securities and Exchange Commission Rule 10a-1 and 10a-2 (Promulgated under the Securities Exchange Act of 1934). Said alleged violation contained in the amended complaint, which was denied by the District Court, charged the defendant brokerage firm with selling securities in petitioner's account as "long sales" when the petitioner did not own the securities so sold. Mr. Joseph Shwartz, from the United States Securities and Exchange Commission, by his testimony (Tr. 458-459), at the trial, substantiated petitioner's allegations made in the amended complaint, which the District Court denied the motion to amend. In the case of United States of America v. Philip Peltz, United States Court of Appeals, Second Circuit, 433 F.2d 48, cert. denied 91 S.Ct. 974, the customer was convicted for misrepresenting that his sales of stock were "long" when in fact they were "short". The court in that case said that the misrepresentations constituted violations of § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

On Dec. 23, 1969, the petitioner filed a motion, Pro se, (A151 to 209) that, Defendants Affidavit filed with the Court were presented in bad faith and that defendants and defendants attorney should be adjudged guilty of contempt. The motion was denied (A 212) on Sept. 28, 1970, even though petitioner's motion indicated crystal clear that defendants affidavits contained perjured statements.

Enormous pressure was used against the petitioner to waive a jury trial. Petitioner's attorneys informed the petitioner through correspondence that they were going to waive jury trial. The petitioner immediately informed his attorneys not to waive a jury trial.

On Feb. 4, 1971, a jury was empannelled and the trial lasted for ten days.

The psychological violence that petitioner was subjected to is indicated in the transcript of the trial, when the District Court stated (Tr, 557-559), that one of the petitioner's attorneys was picking up and driving defendant, Walter Winchester, to the courthouse.

One of the defendants witnessess, Thomas J. Lanigan, testified (Tr. 805), "I want to answer the question, as a witness should, but I don't want to be getting into the point where I am not following the advise of my counsel".

The District Court was privy to information (Tr. 805) about defendants witness that petitioner had no knowledge of.

The District Court (Tr. 548), during the trial, was attempting to intimidate the petitioner in regards to petitioner's personal income taxes, when the District Court stated, "As a taxpayer's proposition, on reporting his losses wouldn't it be interesting to see how Mr. Landry reported these things in his tax returns".

The District Court stated (Tr. 540), during the trial, in reference to petitioner's monthly statements that he received from defendant brokerage firm, "---, and we have scrapped the statements as

far as this case is concerned" "So forget the statements". The District Court made these statements, even though the defendants (Tr. 70) had agreed to all of the monthly statements and the monthly statements were in evidence.

The position of the District Court was made crystal clear, when the District Court stated (Tr. 668), during the trial, to the petitioner, "That is why you have been able to put into the case $42,000 of damage. I know it was up to fifty-six, but that is going out as far as it went in".

The District Court stated (Tr. 540), during the trial, in regards to defendants Exhibit P, "What are we doing with the reconstructed S.M.A.? We are reconstructing what happened here". The District Court, the attorneys, and the defendants knew that the statement made by the District Court was not in accordance with the facts, as the reconstructed S.M.A. (Defendants Exhibit P), indicates that when petitioner's account was long and short the same security that the transactions were "netted out" and the subsequent sale of such security was effected as a "short" sale when, in fact, defendants attorney stated (Tr. 394) to the Court, that there was a failure to net out and Mr. Shwartz, from the SEC, testified (Tr. 458-459) that the violation came when the broker treated securities transactions as "long" sales which the broker should have treated as short sales. Plaintiff's Exhibit 43 was marked in evidence (Tr. 767) and was stipulated to by the defendants. Said Exhibit 43

indicates that a transaction was actually effected as a long sale and this same transaction is shown on Defendants Exhibit P, Reconstructed S.M.A., to have been effected as a short sale.

Petitioner stated to the District Court (Tr. 593), "The only thing I want to bring to your attention, your Honor, as far as the trial up to this moment, it is almost like a kangaroo trial, etc.". Petitioner stated to the District Court (Tr. 670), "---and there is a continuation of the same fraud today".

Petitioner stated to the District Court (Tr. 588), "---my attorneys more or less assured me before coming to trial that the facts would not be brought out. In fact, they guaranteed I was going to lose the case".

During the trial, there was testimony by defendant Philip J. Murphy (Tr. 902, 969) that he was effecting securities transactions in petitioner's account and receiving commissions, during the period when defendant Philip J. Murphy was not a registered representative. Defendant Walter Winchester testified (Tr. 603) that he was the manager for Hemphill Noyes and that (Tr. 639-640) he was responsible for all of the men in the office and that the representatives and everybody in the office were under his control and supervision at all times. Defendant Winchester testified (Tr. 843) that he approved orders that defendant Murphy effected in petitioner's account when defendant Murphy was not a registered representative. Defendant

Walter Winchester testified (Tr. 867), "---you don't turn away business" and that (Tr. 606) defendant Murphy was receiving commissions when defendant Murphy was not a registered representative.

Petitioner testified (Tr. 84) that defendant Murphy never indicated to him that Murphy wasn't a registered representative.

Petitioner's amended complaint, which had been allowed, alleged (In part), in essence, that petitioner relied on representations made by defendants Murphy and Winchester and as a result, petitioner entrusted his stock-brokerage account to defendant Murphy when, in fact, defendant Murphy was not a registered representative authorized by the rules of the New York Stock Exchange to handle customer's stock brokerage accounts. Petitioner testified (Tr. 84) that defendant Murphy never indicated to him that Murphy wasn't a registered representative.

The District Court refused to instruct the jury on petitioner's requested instruction in regards to Rule 345 of the New York Stock Exchange which states (a) No member or member organization shall (1) permit any person to perform the duties customarily performed by a registered representative unless such person shall have been registered and is acceptable to the Exchange.

A timely objection was made, at the trial, to the District Courts' ruling in refusing to instruct the jury on petitioner's requested instruction (As indicated above). The Court of Appeals rejected petitioner's issue without discussion****.

**** This refers to the Court of Appeals printed opinion

The District Court and the Court of Appeals (A 212c and 212d) were aware of the case of Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., C.A.Ind.1969, 410 F.2d 135, certiorari denied 90 S.Ct. 98, 396 U.S. 838, 24 L.Ed.2d 88. In said case the court found that if one of the functions of a rule of the New York Stock Exchange is to protect the public, permitting a private action for violation of such rule is entirely consistent with the Securities Act of 1933 and the Securities Exchange Act of 1934.

The District Court erred in refusing to instruct the jury on petitioner's requested instruction that Rule 401 of the New York Stock Exchange states that every member, allied member and member organization shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs.

There was a preponderance of evidence, at the trial, which clearly indicated that defendants violated Rule 401 of the New York Stock Exchange. As examples; Defendants testified that defendant Murphy was effecting securities transactions in petitioner's account and receiving commissions when defendant Murphy was not a registered representative with the New York Stock Exchange. Defendant admitted to numerous over extentions of credit in petitioner's account in excess of the limits permitted under the Federal securities laws (Over extended credit on fourteen different occasions). Mr. Joseph Shwartz, from the SEC, testified (Tr. 506)

that on one day alone, there was a deficiency in petitioner's account of $93,103.53. Mr. Joseph Shwartz, from the SEC, and defendants witness, Mr. Thomas J. Lanigan, testified that when the defendants demanded $10,000 from petitioner for his account, which petitioner paid, the records maintained by the defendants indicated that no funds were needed for petitioner's account.

A timely objection was made, at the trial, to the District Courts' ruling in refusing to instruct the jury on petitioner's requested instruction (As indicated above). The Court of Appeals rejected petitioner's issue without discussion.

Petitioner testified (Tr. 348), during the trial, that a short sale has to be made in the short account and the District Court erred in refusing to instruct the jury on petitioner's requested instruction that, Any "short sale" would have to be executed in plaintiff's short account and shown on plaintiff's #4 short account monthly statement. A timely objection was made, at the trial, to the District Courts' ruling in refusing to instruct the jury on petitioner's requested instruction (As indicated above). The Court of Appeals rejected petitioner's issue without discussion.

There was a voluminous amount of testimony, during the trial, by the petitioner in regards to Plaintiff's large chalk Exhibit 11-A, 11-B, and 11-C. As an example, petitioner testified (Tr. 172-173, 182, 376-377), before the jury, of a loss of $4,667.11

that appears on petitioner's monthly statement (Plaintiff's Exhibit 5-Pl) and petitioner indicated to the jury this loss of $4,667.11 that appeared on Plaintiff's large chalk Exhibit 11-B, in the LOSS column. The defendants objected (Tr. 368) to the LOSS column on Plaintiff's Exhibit 11-A, 11-B, and 11-C. Just prior to the juries deliberation, the District Court ordered (Tr. 721) that the LOSS column on Plaintiff's large chalk Exhibit 11-A, 11-B, and 11-C be removed and marked for Identification. This was another issue that petitioner raised with the Court of Appeals.

A few minutes prior to petitioner's presentation of his oral argument, before the Court of Appeals, petitioner looked over Plaintiff's large chalk Exhibit 11-A, 11-B, and 11-C and the LOSS columns marked for Identification. Upon inspection, petitioner observed that one of the LOSS columns, which had been marked for Identification, had been tampered with, as someone had neatly cut off a section from the bottom of Plaintiff's Exhibit 11-B, the LOSS column marked for Identification, which contained the figure of $4,667.11, and this lower section was missing. The petitioner informed the Court of Appeals of this, at the opening of petitioner's oral argument. Reference to this was also made in petitioner's, "Petition for Rehearing" which was filed with the Court of Appeals. The Court of Appeals denied petitioner's rehearing. The Court of Appeals rejected petitioner's issue without discussion.

Petitioner filed with the District Court, on Nov. 8, 1968, a motion for leave to file an amended complaint and attached thereto the amended complaint. The District Court made a prejudicial error and abused its discretion by denying on Oct. 8, 1970, petitioner's motion, as the amended complaint contained new additional alleged violations by the defendants of Securities and Exchange Commission Rule 10a-1 and 10a-2 and numerous violations of Rules of the New York Stock Exchange such as Rule 405 also known as, "Know Your Customer" rule of the New York Stock Exchange. The amended complaint also contained a demand for rescission. The evidence, at the trial, substantiated the charges in the amended complaint, said motion to amend the complaint was denied. The Court of Appeals rejected petitioner's issue without discussion.

Petitioner testified (Tr. 335-336), during the trial, that there were securities transactions which were handled as long sales and that by the rules should have been short sales. The District Court refused to instruct the jury, on petitioner's requested instruction that, A "long sale" account according to the Securities Exchange Act, Rule 10a-1 and Rule 10a-2 is a sale of a security that one owns. A timely objection was made, at the trial, to the ruling of the District Court. The Court of Appeals rejected petitioner's issue without discussion.

Petitioner testified (Tr. 128, 56-57, 80, 83, 85, 115, 118, 181, 362) in regards to margin account and long sales. The District Court refused to instruct the jury, on petitioner's requested instruction that, Any "long sale" would have to be effected either on a cash account or a margin account and any "long sale" in plaintiff's margin account would have to be shown on plaintiff's #2 margin account monthly statement.

A timely objection was made, at the trial, to the ruling of the District Court. The Court of Appeals rejected petitioner's issue without discussion.

Defendant Walter Winchester testified (Tr. 706-707), that the maintaining of the S.M.A. account on the margin was the responsibility of Hemphill Noyes, the salesman, and the manager and that in fact, where the credit was extended to the plaintiff, that he and defendant Murphy should have been aware that the credit was extended. Defendant Winchester testified (Tr. 624) that each salesman has to know his customer, and each salesmen, every margin account that they have, they have a pretty fair idea of how the account stands. Defendant Winchester testified (Tr. 691, 858 to 860), that it was first brought to his attention that the account was undermargin in Jan. 24, 1964 and defendants conceded (Tr. 862) that no cash was put in plaintiff's account in Jan., Feb., Mar., April or May. Defendant Winchester testified (Tr. 862) that defendants in April made a purchase in

petitioner's account even though defendants knew that petitioner's account was under margin. Defendant Philip J. Murphy testified (Tr. 979) that he effected the security transaction in petitioner's account in April. The District Court made an error in instructing the jury the matter of the verdict as far as Regulation T is concerned against Defendants Mr. Murphy and Mr. Winchester (Dismissal of individual defendants), as it was in direct conflict with the evidence as indicated by the testimony of defendant Winchester. A timely objection was made, at the trial, to the District Court's order.

The Court of Appeals, in their printed opinion states:

E. Dismissal of Individual Defendants

Since defendants Winchester and Murphy were not personally responsible for maintaining plaintiff's margin account, and since there was no evidence to show that they had actual knowledge of any violations of Regulation T, the district court did not err in dismissing the claim against the defendants.

The statement made by the Court of Appeals, as indicated above, is contrary to the evidence. The petitioner indicated in his brief, reply brief, and again in his, "Petition for Rehearing" that the above statement was not in accord with the evidence. The Court of Appeals denied petitioner's, "Petition for Rehearing".

The District Court erred in refusing to instruct the jury on the following requested instructions by the petitioner:

(a) The churning of the plaintiff's account by the defendant Hemphill Noyes & Co. resulted in a loss to the plaintiff of all of the commissions paid by the plaintiff to defendant corporation.

(b) The churning of the plaintiff's account by the defendant Philip J. Murphy, resulted in a loss to the plaintiff of all the commissions paid by the plaintiff to Hemphill Noyes.

(c) The churning of the plaintiff's account by the defendant, Walter Winchester, resulted in a loss to the plaintiff of all the commissions paid by plaintiff to Hemphill Noyes.

The giving of the above instructions to the jury would have had the effect of making all of the defendants liable jointly and severally to the same extent for violating the Exchange Act, which instructions would have been in conformity with Section 20(a) of the Securities Exchange Act of 1934, 48 Stat. 899; 15 U.S.C. ¶ 78t. At the trial, there was a timely objection made to the District Court ruling. The Court of Appeals did not reply to the issues raised by the petitioner.

During the trial, the defendants on two occasions made a motion for directed verdict on the "churning" claim, which was denied.

The jury did, in fact, find the defendants guilty of "churning" petitioner account and assessed different amount of damages to each of the three defendants, which totalled $6,500 and the District Court subsequently granted defendants motion for judgement notwithstanding the verdict because the District Court (A 250d) had reservations as to whether the defendants should be liable jointly or severally for the amount of $6,500.

Petitioner in his, "Petition for Rehearing" which was filed with the Court of Appeals, indicates clearly that the conclusion of the Court of Appeals as indicated in their Opinion, in regards to the "churning" issue, is entirely erroneo

During the trial, the District Court stated (Tr. 44) in regards to rescission, that the District Court would encompass that under the Regulation T claim and then subsequently, the District Court stated (Tr. 162) in regards to rescissior "What does that mean?".

The District Court erred in sustaining objection by defendants which prevented petitioner (Tr. 162) from testifying, before the jury, pertaining to the amount of money involved on the rescission aspect of the case. An offer of proof (Tr. 171) was made that the petitioner would have testified that it would be approximately $150,000.

The District Court was made aware (Tr. 165) of the case of Warshaw versus Hentz and Company, (1961) 199 F. Supp. 581.

In said case, a suit was allowed where a stock purchaser stated claims for rescission and recovery of damages against a broker who allegedly pledged securities purchased beyond permissable margin requirements with a lender which subsequently became solvent, causing loss of the purchaser's cash payment.

Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78cc(b), provides that every contract which violates any provision of the Act or regulations thereunder is void and unenforceable by the party violating the Act, and the other party is entitled to rescission. Petitioner's rescission claim, therefore, is specifically authorized by the Act. Further, the complaint supports a claim for damages sustained as the proximate consequence of defendant's acts made illegal by Section 10(b) and Section 7(c) of the Act, 15 U.S.C.A. § 78g(c). See Smith v. Bear, 237 F.2d 79, 87, 60 A.L.R.2d 1119 (2 Cir., 1956) and Remar v. Clayton Securities Corporation, 81 F.Supp. 1014, 1017 (D.Mass 1949).

Petitioner brought the issue of Rescission before the Court of Appeals. The Court of Appeals rejected petitioner's issue without discussion.

The District Court erred in refusing to instruct the jury on punitive damages (Tr. 1054). In the case of deHass v. Empire Petroleum Co., 302 F.Supp. 647, August 22, 1969, the court found that punitive damages are allowable in an action

for violation of Rule 10b-5 where aggravated scienter is clearly shown by the facts. (See also W. Prosser, Law of Torts § 2 (3d ed. 1964) Prosser states that punitive damages may be awarded "where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime***".

Defendant Winchester and defendant Hemphill, Noyes & Co. permitted defendant Murphy to effect securities transactions in petitioner's account when defendant Murphy was not a registered representative. Defendants (Tr. 628) asked petitioner to come in with some money and according to the records maintained by defendant Hemphill, Noyes & Co., at the time, indicated an adequate amount of money in petitioner's account and there was no reason to call petitioner for funds (Tr. 509, 774-775), defendant Winchester testified (Tr. 863-864) that all of the representations made to Winchester, indicated that petitioner's account was okay. Defendant Winchester testified (Tr. 624) that each salesman has to know his customer, and each salesman, every margin account that they had, they had a pretty fair idea of how the account stands. Mr. Joseph Shwartz, from the S.E.C., testified to numerous over extentions of credit in petioner's account. Mr. Joseph Shwartz testified (Tr. 506) that on one day petitioner's account had a deficiency of $93,001.02. Numerous other examples were cited in petitioner's brief, to the Court of Appeals,

of defendants wrongdoing which were intentional and deliberate, and had the character of outrage frequently associated with crime. In regards to petitioner's issue of punitive damages, the Court of Appeals rejected petitioner's issue without discussion.

The District Court erred in refusing to submit to the jury a seperate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendant against the petitioner prohibited by Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The Court of Appeals, in their printed opinion, stated, "Along with other examples of defendants' supposedly fraudulent conduct which we do not find worthy of mention, this objection is based upon defendant Murphy's alleged guarantee of a ten percent return on plaintiff's investment. Since plaintiff made no attempt to establish the relationship of this guarantee to any of his specific losses, the district court acted properly in refusing to submit this claim to the jury".

The District Court and the Court of Appeals are in error as their decision conflicts with the evidence. Petitioner testified (Tr. 339) that a letter of complaint was sent to the defendant brokerage firm on May 18, 1964 and that shortly thereafter (Tr. 340) defendant brokerage firm sold all of the securities

that petitioner had given to the brokerage firm and that the petitioner received nothing. Petitioner testified (Tr. 154) that he never received a ten percent return and that (Tr. 149) the monthly statements indicate that there was a loss of approximately $96,000.

Some of the wilful fraudulent practices perpetrated by the defendants on the petitioner, which are indicated in petitioner's brief to the Court of Appeals, which fraudulent conduct the Court of Appeals did not find worthy of mention, are as follows:

1. Defendant Winchester's testimony (Tr. 699, 865) indicates that he was familiar with the New York Stock Exchange rules since he has been with the firm and that (Tr. 714) when he became a registered representative, he became familiar with the rules and also he had been educated in the rules of the New York Stock Exchange by his employer. Defendant Murphy testified (Tr. 902, 969) that he effected securities transactions in petitioner's account when he was no a registered representative and that defendant Winchester approved all of those transactions. Defendant Winchester testified (Tr. 616) that he was aware that defendant Murphy was not registered from May to Nov. 1962. Defendant Winchester testified (Tr. 615, 703) that defendant Murphy received commissions from the time that defendant Murphy first handled

petitioner's account up through June of 1964. Petitioner testified (Tr. 133), that his entire account was liquidated May, 1964. Petitioner testified (Tr. 84), that defendant Murphy never indicated to petitioner that Murphy wasn't a registered representative.

The defendants willfully violated Rule 345 of the New York Stock Exchange, which states, (a) no member or mamber organization shall (1) permit any person to perform regularly the duties customarily performed by a registered representative unless such person shall have been registered and is acceptable to the Exchange.

The District Court and the Court of Appeals were made aware (A 212c-212d) of the case of Buttrey v. Merrill Lynch, Fenner & Smith, Inc., United States Court of Appeals, Seventh Circuit, 410 F.2d 135 (1969), cert. denied 396 U.S. 838, the court in that case found that a private action lies for violations of Securities Act and Securities Exchange Act and Rule 10b-5 when the broker violated a Rule of the New York Stock Exchange when such Rule is to protect the public.

2. Petitioner testified (Tr. 100, 102-103, 256-257, 263), that he complained to defendants Murphy and Winchester in regards to defendant Murphy selling securities in petitioner's account, which securities petitioner did not own.

Petitioner testified (Tr. 257, 360), that he complained after he got out of the hospital, in regards to transactions (Tr. 378) that defendant Murphy effected in petitioner's account while petitioner was in the hospital.

Petitioner testified (Tr. 339-340), that he made a complaint to defendant brokerage firm through a letter of complaint which was sent out on May 18, 1964 and that, subsequently, on May 21, 1964, petitioner received a telegram (Tr. 134-135, Plaintiff's Exhibit 19) from defendant brokerage firm which demanded $37,000 or petitioner's account would be liquidated, and the telegram further implied that defendant brokerage firm allowed petitioner's account to go $37,000 below margin requirements of the New York Stock Exchange. Petitioner testified (Tr. 135), that his account was completely liquidated and that he received nothing.

3. Defendant Winchester testified (Tr. 713) that he was familiar with each of the confirmation slips that were sent out during the period 1962 to 1964 and that, at that time its language was to the effect that transactions were subject to the rules of the New York Stock Exchange and the broker agrees to comply with the rules of the New York Stock Exchange.

4. Petitioner testified (Tr. 366-367-368), in essence, that when petitioner's

account was simultaneously long and short the same security, that according to Regulation T, the two transactions have to be netted out and the the subsequent sale of the same security has to be treated as a short sale.

Petitioner testified (Tr 142), that his account was simultaneously long and short the same security, 14 times.

Mr. Joseph Shwartz, from the S.E.C., testified (Tr. 458-459) that the violation came when the defendant broker treated securities transactions as long sales which the broker should have treated as short sales.

Defendant Murphy testified (Tr 973-974), that the number two account was the margin account and that the number four account was the short account. Defendant Murphy tsetified that when you don't own a stock, it must be a short sale and treated as such. Defendant Murphy testified that he was aware of the rules concerning longs and shorts and margin. Defendant Murphy testified, that he knew a long sale was supposed to be marked long and a short sale was supposed to be marked short. Defendant Murphy testified (Tr 979) that a long sale doesn't require margin and that a short sale requires margin. Defendant Murphy testified (Tr 973, 981-982), that he executed the transaction of Xerox with a settlement date of June 19, 1963 in petitioner's long account, the number two margin account and by executing it as a

long sale the margin requirements was avoided.

Mr. Shwartz, from the S.E.C., testified (Tr 455), that the transaction of June 19, 1963 should have been treated as a short sale requiring margin.

The date of June 19, 1963 is the settlement date and June 13, 1963 is the trade date (Tr 687).

Defendant (Tr 767) reoffered Plaintiff's Exhibit 43 and it was marked in evidence. Said Exhibit 43 indicates the transaction which defendant Murphy had previously testified about, and said Exhibit shows that the transaction should have been effected as a "short" sale as required and that actually the transaction was effected as a "long" sale.

The District Court and the Court of Appeals were made aware (Tr. 652) of the case of United States of America v. Peltz, United States Court of Appeals 2nd Circuit, 433 F.2d (1970), cert. denied 91 S.C. Rptr. 974. The customer was convicted for misrepresenting that his sales of stock were "long" when in fact they were "short", the court in that case said the misrepresentations constituted violations of Section 10(b) of the Securities Exchange Act of 1934 as well as Rule 10b-5 promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934.

5. Petitioner testified (Tr. 341), that whenever the defendants requested any money, petitioner gave it to them.

Petitioner testified (Tr. 343), that on August 23, 1963, there was $10,000 deposited, on Sept. 16, 1963 $5,000 was deposited and $1,000 was returned to petitioner, and on Oct. 1, 1963 there was $850 deposited.

Mr. Joseph Shwartz, from the S.E.C., testified (Tr. 509), in essence, that according to the records maintained by defendant broker, there was no need to have called petitioner for any money.

Defendants witness, Mr. Thomas Lanigan, testified (Tr. 775), in essence, that according to the records maintained by the defendant broker, there was no reason to ask petitioner for $10,000 in August.

Defendant Winchester testified (Tr. 863-864), that in August of 1963 all of the representations made to him was that petitioner's account was okay as far as the margin requirements.

As can be seen, by the testimony, petitioner deposited in his account $14,850 at the request of the defendants, when the defendants knew that according to their records that they maintained, there was no need to have requested petitioner for any money.

Numerous other examples were cited in petitioner's brief filed with the Court of Appeals, and transmitted to this

Court, of the wilful fraudulent practices perpetrated by the defendants on the petitioner.

The District Court erred by ordering during the course of the trial, that losses were to be computed on the basis of the difference between the short sale and the first purchase thereafter, regardless of how the transactions were entered on the account as whether having occured in the number two account or number one account or number four account.

By the order of the District Court, resulted in the jury getting fictitious losses. That is, losses much smaller than the actual losses that petitioner sustained.

The proper method of calculating the actual losses sustained by the petitioner is described by the testimony of Thomas J. Staiti (Tr. 513 to 520), Certified Public Accountant.

There was an offer of proof (Tr. 588) made on behalf of the petitioner, that Mr. Staiti would have testified that the total net loss in petitioner's three accounts was $84,746.51 and petitioners Exhibit 42 was marked for Identification (Tr. 589).

The loss that was given to the jury for their determination was $56,280.42 (A 236, 241).

The manner in which to calculate the actual losses sustained by the petitioner, as testified to by Mr. Staiti, was described in petitioner's, "Petition for Rehearing", Page 9 to 13.

The Court of Appeals denied petitioner's, "Petition for Rehearing".

The District Court erred in refusing to instruct the jury, on petitioner's requested instruction, that defendant, Walter Winchester, violated Rule 431 of the New York Stock Exchange by failing to maintain the proper margin in petitioner's account.

Defendant Winchester testified (Tr. 699, 714, 865) that he was familiar with the Rules of the New York Stock Exchange.

Defendant Winchester testified (Tr. 715), that Rule 431 of the New York Stock Exchange deals with minimum margin maintenance and that in May of 1964, defendants demanded $37,000 because petitioner's account had gone below the margin requirements. Defendant Winchester testified (Tr. 859) that it was first brought to his attention that petitioner's account was under margin in January of 1964. Defendant Winchester testified (Tr. 707) that he was the overseer of the office and checked the accounts and that he should have been aware that the credit was extended.

The Court of Appeals rejected petitioner's issue without discussion.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT RENDERED A DECISION IN CONFLICT WITH THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ON THE SAME MATTER

Petitioner's complaint alleged, in part, (Tr. 14-15-16), the following,

"In June 1962, defendant Walter Winchester, hereinafter called Winchester, office manager and agent of Hemphill Noyes in Worcester, Massachusetts, arranged to have William Mitchell, hereinafter called Mitchell, a registered representative employed by Hemphill Noyes in its Worcester office, with whom the plaintiff was acquainted, to introduce the plaintiff to the defendant Philip J. Murphy, who was at that time an employee of Hemphill Noyes in its Worcester office, with the objective of inducing the plaintiff to entrust the handling of plaintiff's stock brokerage account to Murphy. After Mitchell introduced the plaintiff to Murphy, Murphy represented to the plaintiff that he possessed exceptional knowledge of the stock market and experience in handling investments in the stock market, and Winchester corroborated these representations to the plaintiff. In addition, Murphy guaranteed to the plaintiff a ten per cent return on his investment if the plaintiff entrusted the handling of his account to Murphy.

In reliance upon such representations, the plaintiff did entrust the handling of his stock brokerage account to the defendant Murphy. In fact, at the time such representations were made, defendant Murphy had been employed by Hemphill Noyes for approximately one month as a trainee, had never handled any stock brokerage accounts as a registered representative, did not possess exceptional knowledge of the stock market and experience in handling investments in the stock market, was not a registered representative authorized by the rules of the New York Stock Exchange to handle customers' stock brokerage accounts, and had not even taken the training course and the examination prescribed by Hemphill Noyes and the New York Stock Exchange as requirements for registration as a registered representative.

4. Hemphill, Noyes through its agents Murphy and Winchester created a relationship of special trust and confidence between plaintiff and Murphy by telling plaintiff on numerous occasions during the period 1962 to May 1964 that plaintiff must have the utmost trust and confidence in Murphy and follow completely his proffessional recommendations on the buying and selling of stocks inasmuch as Murphy possessed great competence and expertise in that field which far exceeded that of plaintiff. The relationship of special trust and confidence thus created was such that plaintiff authorized Murphy to make purchases and sales for plaintiff's account without consulting

plaintiff when plaintiff was unavailable and plaintiff gave to Murphy a full discretionary power over plaintiff's acacount while plaintiff was in the hospital from May 1963 to June 1963.

5. Hemphill, Noyes and its agents Winchester and Murphy abused the special relationship of trust and confidence created between plaintiff and Murphy by defendants, by engaging in fraudulent and deceitful activities with respect to the plaintiff in connection with the sale of securities by the use of telegraphic communication and other instruments of interstate commerce and by the use of the mails, in violation of Section 17(a) of the Securities Act of 1933, as amended, 48 Stat. 84, 15 U.S.C. §77q, and by using or employing deceptive devices with respect to plaintiff in connection with the purchase or sale of securities by the use of telegraphic communication and other instrumentalities of interstate commerce and the mails and the facilities of the New York Stock Exchange, in violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, 48 Stat. 891, 15 U.S.C. § 78j, ---"

Mr. Mitchell testified (Tr. 879-880), that he introduce petitioner to Murphy at Winchester's suggestion. Defendant Winchester testified (Tr. 604-605-606, 698-699, 865), that Mr. Mitchell introduced petitioner to defendant Murphy in July 1962 and that he was present at the time and that defendant Murphy was not a registered representative and also that defendant Murphy began effecting securi-

ties transactions in petitioner's account and receiving commissions when defendant Murphy was not registered.

Petitioner testified (Tr. 64), that defendant Murphy informed him that he was a market analyst and investment advisor and that if petitioner turned over his portfolio to him and gave him discretionary powers that Murphy would guarantee petitioner a ten per cent return on his account. Defendant Murphy gave to petitioner a bunch of market letters that he was the author of.

Petitioner testified (Tr. 66), that he spoke to defendant Winchester and repeated what defendant Murphy informed him and that defendant Winchester said, You can go along a hundred per cent with Murphy. The New York office considers him a genius. He got the highest score that they have on the test". Petitioner testified (Tr. 66) that he turned over a list of securities to defendant Murphy and gave him discretionary powers.

Defendant Winchester testified (Tr. 699), that defendant Murphy had other accounts when he was not a registered representative. Defendant Winchester testified (Tr 867), you don't turn away business and that any clients that wanted to give Murphy business, prior to Murphy's registration, could give it to him.

Defendant Winchester testified (Tr. 700), that he gave his okay to any order Murphy effected prior to Murphy's registration.

Defendant Winchester testified (Tr 615), that Murphy received commissions from the first time he handled petitioner's account up to June 1964.

Defendant Winchester testified (Tr. 869-870), that defendant Murphy did every thing a registered representative would do, prior to defendant Murphy becoming registered.

Defendant Murphy testified (Tr 902), "We had a procedure whereby people could do business with an unregistered representative, etc."

Defendant Murphy testified (Tr 903), to securities transactions that he effected in petitioner's account when he was not a registered representative.

Mr. Joseph Shwartz, from the S.E.C., testified (Tr 412) to the first transaction that defendant Murphy effected in petitioner's account which resulted in a violation of Regulation T and then Mr. Shwartz testified in regards to another transaction that defendant Murphy effected in petitioner's margin account, when he was not registered, which resulted in violation of Regulation T (Tr. 422).

Defendant Winchester testified (Tr 699), that defendant brokerage firm is a member of the New York Stock Exchange.

Defendant Winchester testified (Tr 639, 866), that he was in charge and was responsible for all of the men in his office and that he was aware of everything that was going on.

Defendant Winchester testified (Tr. 699, 865), that he was familiar with New York Stock Exchange Rules since he has been with the firm and he (Tr 714) was educated on New York Stock Exchange Rules by the firm.

Defendant Winchester testified (Tr. 700) as to requirements to become a registered representative.

Defendant Winchester testified (Tr. 713) that he was familiar with each confirmation slip for the period 1962-1964 and its language was to the effect that transactions were subject to the rules of the New York Stock Exchange and the broker agrees to comply with the rules of the New York Stock Exchange.

Petitioner testified (Tr. 84), that defendant Murphy never indicated to petitioner that Murphy wasn't a registered representative. (EMPHASIS ADDED)

The District Court refused to instruct the jury, on petitioner's requested instruction, that
Rule 345 of the New York Stock Exchange states,

"(a) No member or member organization shall

(1) permit any person to perform regularly the duties customarily performed by a registered representative, unless such person shall have been registered and is acceptable to the Exchange."

A timely objection was made, at the trial, to the District Court ruling.

The Court of Appeals rejected petitioner's issue without discussion.

Petitioner submits that its public importance is obvious, and that it was wrongly decided below.

The Court of Appeals for the First Circuit has rendered a decision in conflict with the Court of Appeals for the Seventh Circuit on the same matter.

In the case of Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., U.S. Court of Appeals, Seventh Circuit, 410 F.2d 135 (1969), the court in that case found that a private action lies for violations of Securities Exchange Act and Securities Act and Rule 10b-5 of the Securities Exchange Commssion when the broker violated a Rule of the New York Stock Exchange when such Rule is to protect the public.

In the case of Brennan v. Midwestern United Life Ins. Co., D.C.Ind.1968, 286 F.Supp. 702, affirmed 417 F.2d 147 (Seventh Circuit), cert. denied 90 S.Ct. 1122, 397 U.S. 989, 25 L.Ed.2d 397 it was found that a securities dealer who does business with the public, even at arm's length, impliedly represents that he will deal fairly with the public.

On Nov. 8, 1968, the petitioner filed, with the United States District Court, "Motion For Leave To File Amended Complaint".

A copy of said manded complaint, appears in the Appendix (Page 124 to Page 135), which was before the Court of Appeals and certified to this Court.

On Nov. 8, 1968, the petitioner also filed, with the United States District Court, "Motion By Plaintiff With Supporting Document Requesting Court To Resolve Motions That Have Been Filed". The supporting document was a letter from petitioner's personal doctor.

A copy of said motion appears in the Appendix (Page 136 to 138), which was before the Court of Appeals and certified to this Court.

On Nov. 21, 1968, Mar. 4, 1969, July 14, 1969, Sept. 2, 1969, and Nov. 10, 1969 the petitioner sent letters to the Hon. W. Arthur Garrity, Jr., begging the Courts indulgence for decision or hearing on motions that had been filed. Said letters were certified to the Court of Appeals and transmitted to this Court.

On Oct. 8, 1970, the District Court denied petitioner's, "Motion For Leave To File Amended Complaint".

All of the petitioner's complaints that were filed with the U. S. District Court alleged that the defendants engaged in fraudulent and deceitful activities with respect to petitioner, and as a result, the defendants violated Section 17(a) of the Securities Act of 1933, 48 Stat. 84, 15 U.S.C. § 77q and Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j.

One of the petitioner's issues before the Court of Appeals was that the District Court made a prejudicial error and abused its discretion by denying, on Oct. 8, 1970, "Motion For Leave To File Amended Complaint", which was filed on Nov. 8, 1968.

Said amended complaint, which the District Court denied, contained among other allegations, that defendants knowingly violated Securities and Exchange Commission Rules and knowingly violated numerous Rules of the New York Stock Exchange, such as, Rule 345, Rule 401, and Rule 405 of the New York Stock Exchange.

Rule 405 of the New York Stock Exchange is also known as, "Know Your Customer" Rule.

Said New York Stock Exchange Rules which the petitioner alleged that defendants knowingly violated, were Rules for the direct protection of investors.

Some of the pertinent sections of the Rules of the New York Stock Exchange which petitioner alleged that defendants knowingly violated, are as follows;

Rule 345 of the New York Stock Exchange states,
"(a) No member or member organization shall
(1) permit any person to perform regularly the duties customarily performed by a registered representative, unless such person shall have been registered and is acceptable to the Exchange."

Rule 401 of the New York Stock Exchange states,
"Every member, allied member and member organization shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs."

Rule 405 of the New York Stock Exchange states,
"Every member organization is required through a general partner or an officer who is a holder of voting stock to
(1) Use diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.
(2) Supervise diligently all accounts handled by registered representatives of the organization."

A hearing was held, before the District Court, in regards to petitioner's, "Motion For Leave To File Amended Complaint" and a transcript of said hearing is shown in the Appendix (Page 212c and 212d), which was before the Court of Appeals and certified to this Court.

At said hearing, as indicated in Appendix, the petitioner informed the District Court that paragraphs eleven through 30 are new paragraphs in the amended complaint and pinpoints the type and nature of the case. In the case of Stella versus Kaiser et al., 5 S.E.C. Judicial, December, Page 813 (82 F.Supp. 301), it was found that a motion to dismiss, or to strike, alleging that certain paragraphs in a complaint in a federal action fail to state a cause of action under federal law will be denied where the transactions referred to therein cannot be seperated from the transactions involved in other paragraphs of complaint. Federal Rules of Civil Procedure, rule 12(b)(6), 28 U.S.C.A.

At said hearing, the petitioner informed the District Court of the Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.. This is indicated in the Appendix (Page 212c and Page 212d), which was before the Court of Appeals and certified to this Court.

In the case of Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., United States Court of Appeals, Seventh Circuit, 410 F.2d 135 (1969), cert. denied 90 S.Ct. 98, 396 U.S. 838, 24 L.Ed. 2d 88, the court in that case found that

a private action lies for violations of Securities Exchange Act and Securities Act and Rule 10b-5 of the Securities Exchange Commission when the broker violated a Rule of the New York Stock Exchange when such Rule is to protect the public.

In regards to petitioner's issue, of the District Court denying petitioner's motion for leave to file an amended complaint, the Court of Appeals rejected petitioner's issue without discussion.

The action of the Court of Appeals, which in effect affirmed the action of the District Court, thus denying the petitioner the right to include, in his complaint, other Rules of the New York Stock Exchange which defendants knowingly violated and which are actionable under the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 is in direct conflict with the decision that was rendered by the Court of Appeals, for the Seventh Circuit on the same matter in the Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Previously cited).

As previously indicated, all of the complaints that were filed with the U. S. District Court alleged that the defendants engaged in fraudulent and deceitful activities with respect to the petitioner, and as a result the defendants violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934.

The District Court erred in refusing to instruct the jury, on petitioner's requested instruction, "That Rule 401 of the New York Stock Exchange states that every member, allied member and member organization shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs.

There was a preponderance of evidence, at the trial, that defendants flagrantly violated said Rule. Such as;

(a) Defendants permitted defendant Murphy to perform regularly the duties customarily performed by a registered representative when defendants knew that defendant Murphy was not, at the time registered and had not been, at the time, accepted by the Exchange (Tr. 869-870).

(b) Defendants permitted defendant Murphy to effect securities transactions in petitioner's account, even on margin, when defendant Murphy was not a registered representative (Tr. 903-904, 420-421).

(c) Defendants, on numerous occasions, over extended credit in petitioner's account in excess of the limits permitted under the Federal securities laws.

(d) Defendants demanded various sums of money from the petitioner which totalled $14,850, which defendants informed petitioner was needed for his account, which petitioner deposited when, in fact, defendants records that were maintained of petitioner's account indicated a surplus of money in petitioner's account (Tr. 343, 509, 774-775).

(e) Defendants records of S.M.A. account that they maintained for the petitioner, were kept in a woefully, haphazard, repeatedly innacurate, and inconsistent basis in violation of Regulation T, Section 220.4(a)(2), (Tr. 466, 733).

(f) Defendants violated Regulation T, Section 220.3(g) by failing to "net out" a long and short position in the same security, when they were held simultaneously in petitioner's account (Tr. 394).

(g) Defendants were executing certain transactions as "long" sales when, in fact, defendants should have been executing these transactions in accordance with S.E.C. Rules as "short" sales (Tr. 458-459, 767, Plaintiff's Exhibit 43).

(h) Defendants allowed petitioner's account to go $37,000 below the minimum margin maintenance requirements of Rule 431 of the New York Stock Exchange (Tr. 134-135, 339-340, 699, 714-715-716, Plaintiff's Exhibit 19).

(i) Defendants violated the agreement that was indicated on all of the confirmation slips that were mailed to the petitioner by defendants Hemphill Noyes & Co. The agreement indicated on the confirmation slips is to the effect that transactions were subject to the rules of the New York Stock Exchange and the broker agrees to comply with the rules of the New York Stock Exchange (Tr. 713).

(j) Defendant Murphy informed the petitioner that he made a technical analysis of securities and the evidence indicates that defendant Murphy never made said technical analysis (Tr. 92, 945-946, 322, Plaintiff's Exhibit 31). Defendant Murphy testified (Tr. 952), "It might be a valid thing to trade on the basis of a rumor that was going around even though you don't believe the rumor".

A timely objection was made, at the trial, to the District Court's ruling in refusing to instruct the jury on petitioner's requested instruction on Rule 401 of the New York Stock Exchange.

The Court of Appeals rejected petitioner's issue without discussion.

The Court of Appeals for the First Circuit has rendered a decision in conflict with the United States Court of Appeals for the Seventh Circuit on the same matter for the same reasons as previously discussed.

All of the petitioner's complaints that were filed with the U. S. District Court contained an allegation that petitioner's account was extended credit in excess of the limits permitted under Rule 431 of the New York Stock Exchange (Tr. 18), (Appendix, Page 70, before the Court of Appeals and certified to this Court).

Rule 431 of the New York Stock Exchange concerns itself with minimum margin maintenance requirements.

The pertinent sections of Rule 431 of the New York Stock Exchange (emphasis added is as follows;

(b) The margin which must be maintained in margin accounts of customers, whether members, allied members, member organizations or non-members shall be as follows:

(1) 25% of the market value of all securities "long" in the account; plus

(3) $5.00 per share or 30% of the market value, in cash, whichever is greater, of each stock "short" in the account selling at $5.00 per share or above.

Defendant Winchester testified (Tr. 699), that he was familiar with New York Stock Exchange Rules. Defendant Winchester testified (Tr. 630), that he was familiar with margin accounts and (Tr. 634) long and shorts. Defendant Winchester testified (Tr. 624), in regards to margin, that he kept a running account in the office and that (Tr. 715-716) petitioner's account, in May of 1964, had gone $37,000 below the margin requirements and that in Jan. of 1964 the account was over-extended.

Petitioner testified, that after he made a complaint to defendant brokerage firm, petitioner received a telegram demanding $37,000. Petitioner testified that defendant brokerage firm sold all of the securities that he had given to them and that he received nothing (Tr. 134-135, 399-340, Plaintiff's Exhibit 19).

The District Court refused to instruct the jury, on petitioner's requested instruction that, Defendant, Walter Winchester, violated Rule 431 of the New York Stock Exchange by failing to maintain the proper margin in plaintiff's account.

A timely objection was made, at the trial, to the District Court's ruling.

The Court of Appeals rejected petitioner's issue without discussion.

The impact of the decision below on the investing public is enormous.

The Court of Appeals for the First Circuit has rendered a decision in conflict with the Court of Appeals for the Seventh Circuit on the same matter.

Petitioner's complaint alleged violations, by the defendants, of the antifraud provisions of the Securities Act of 1933 and Securities Exchange Act of 1934 as well as Rule 431 of the New York Stock Exchange.

In the case of Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., U.S. Court of Appeals, Seventh Circuit,

410 F.2d 135 (1969), the court in that case found that a private action lies for violations of Securities Exchange Act and Securities Act and Rule 10b-5 of the Securities Exchange Commission when the broker violated a Rule of the New York Stock Exchange when such Rule is to protect the public.

The evidence, at the trial, was crystal clear that the defendants knowingly violated Rules of the New York Stock Exchange, as previously described, and that said Rules is to protect the public.

Petitioner's complaint alleged that the defendants engaged in fraudulent and deceitful activities with respect to petitioner, and as a result, the defendants violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934.

The evidence, at the trial, supported petitioner's allegations contained in his complaint.

The fraudulent and deceitful activities by the defendants is described in petitioner's brief that was filed with the Court of Appeals and transmitted to this Court.

The District Court erred by refusing to submit to the jury, a seperate claim form, as requested by petitioner, with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against the petitioner in violation of Section 10(b)

of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

The Court of Appeals upheld the decision of the District Court.

Petitioner submits that its public importance is obvious, and that it was wrongly decided below.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON THE SAME MATTER

As previously discussed, one of the issues before the Court of Appeals was that the District Court made a prejudicial error and abused its discretion by denying, on Oct. 8, 1970, "Motion For Leave To File Amended Complaint", which was filed on Nov. 8, 1968.

A copy of said amended complaint, which the District Court denied, appears in the Appendix (Page 124 to 135), which was before the Court of Appeals and certified to this Court.

One of the allegations contained in said amended complaint, appears in said Appendix, Page 145, Paragraph 11, and is as follows,

"11. In Handling plaintiff's account, defendant Hemphill, Noyes repeatedly sold securities in plaintiff's margin account the sale of which plaintiff is informed and believes and therefore alleges that he was not, at the time the sales were

made, the owner or assignee thereof, which defendants well knew or should have known that these securities transactions were being effected as "long sales" in violation of the Securities and Exchange Commission Rules, Section 10a-1 and 10a-2".

The Court of Appeals, in regards to the issue of the District Court denying petitioner's motion, rejected petitioner's issue without discussion.

Petitioner has previously outlined, in this Petition, the reasons why, "Motion For Leave To File Amended Complaint" should have been granted and its public importance is obvious, and that it was wrongly decided below.

The District Court and the Court of Appeals were made aware (Appendix, Page 226, which was before the Court of Appeals and certified to this Court) (Brief, Page 91, filed with the Court of Appeals and transmitted to this Court) (Tr. 652, 658) of the case of United States of America v. Philip Peltz, United States Court of Appeals, Second Circuit, 433 F.2d 48, cert. denied 91 S.Ct. 974, the customer was convicted for misrepresenting that his sales of stock were "long" when, in fact, they were "short". The court in that case said the misrepresentations constituted violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

By analogy the defendants in this case misrepresented to the petitioner, and

therefore violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by fowarding to the petitioner monthly statements which showed certain securities transactions being effected as "long" sales when in fact by SEC Rules, defendants should have executed these transactions as "short" sales.

Petitioner testified (Tr. 335-336, 367-368), at the trial, that certain securities transactions were handled as long sales, and by the rules, should have been handled as short sales.

Petitioner's testimony (Tr. 97-98-99, 365-366-367-368) (emphasis added), in essence, indicates that on May 21, 1963 indicated on Plaintiff's Exhibit 11-B as Item 76, a short sale of 200 shares of Chrysler Corp., in the number four short account in the amount of $11,098.09 and then there was a purchase in the margin account on June 12th and that is Item 78 on the chart. Now, when the Chrysler was purchased, it was purchased in the long account and it was not netted out. The following day, which was June 13th, which is Item number 79 on the chart, indicates the sale of Chrysler in the margin account in the amount of $12,995.39, that sale was handled like a regular long sale, as if I owned the security and I didn't own it, and that should have been a short sale of Chrysler at that particular time, which required margin, etc..

Mr. Joseph Shwartz, from the U. S. Securities and Exchange Commission, confirmed the petitioner's testimony by his testimony (Tr. 457-458-459) (emphasis added), that on May 21, 1963 there was a short sale of Chrysler in petitioner's short account and that on June 12, 1963 there was a purchase of Chrysler Corp. and that under Regulation T, resulted in a pair off and that on June 13, 1963 there was a sale of Chrysler in petitioner's margin account which should have been a short sale requiring margin.

The District Court stated (Tr. 458-459), (emphasis added), in essence, that the short sale in May and the purchase in June was required to be cancelled out and that the violation came when the subsequent sale was treated long by the broker and should have been treated as a short sale. Mr. Shwartz, from the U. S. Securities and Exchange Commission, agreed.

The petitioner testified (Tr. 104, 111, 378), that he was in the hospital when defendant Murphy effected these transactions in his account.

Defendants witness, Mr. Thomas J. Lanigan, testified (Tr. 734), in reply to a question by the District Court, that there were very serious errors starting on June 13th.

Petitioner testified (Tr. 142), that his account was simultaneously long and short the same security on 14 occasions.

The evidence indicates that on 14 occasions the defendant brokerage firm effected securities transactions as long sales when the defendant brokerage firm should have effected these transactions as short sales.

Plaintiff's Exhibit 43 (Tr. 767) was stipulated to and was reoffered by the defendants and marked in evidence. Plaintiff's Exhibits was before the Court of Appeals and certified to this Court.

Plaintiff's Exhibit 43 indicates a security transaction that was actually effected as a "long" sale and which was required to have been effected as a "short" sale.

Petitioner testified (Tr. 367) (emphasis added), that there was a sale of Chrysler, in his account, that was handled like a regular long sale, as if he owned the security and that he didn't own it and that should have been a short sale of Chrysler at that particular time, which required margin etc..

The District Court refused to instruct the jury, on petitioner's requested instruction that,

> A "long sale" account according to the Securities Exchange Act, Rule 10a-1 and Rule 10a-2 is a sale of a security that one owns.

A timely objection was made, at the trial, to the District Court's ruling.

The Court of Appeals rejected petitioner's issue without discussion.

Petitioner submits that its public importance is obvious, and that it was wrongly decided below.

The District Court refused petitioner's request to submit to the jury a seperate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against petitioner in violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

The Court of Appeals upheld the District Court's actions.

The United States Court of Appeals for the First Circuit has rendered a decision in conflict with the United States Court of Appeals for the Second Circuit on the same matter. In the case of United States of America v. Philip Peltz, United States Court of Appeals, Second Circuit, 433 F.2d 48, cert. denied 91 S.Ct. 974, the court in that case found that when misrepresentations were made that sales of stock were "long" when, in fact, they were "short" constituted violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

In the case of Opper v. Hancock Securities Corp., D.C.N.Y.1966, 250 F.Supp. 668, affirmed 367 F.2d 157 it was stated that when Congress struck in this chapter at the particularized problems of manipulative, deceptive, or otherwise fraudulent practices in the securities markets, it meant to reach frauds that may take on more subtle and involved forms than those in which dishonesty manifests itself in cruder and less specialized activities. (2nd Circuit)

THERE IS EVIDENCE THAT THERE WAS A CONSPIRACY TO DENY PETITIONER A JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF HIS ACTION (OBSTRUCTION OF JUSTICE) WHICH DENIED PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT

Petitioner testified (Tr. 79-80-81, 368, 375), that he made the chalks, (Plaintiff's Exhibit 11-A, 11-B, 11-C)* based on the monthly statements that he received from defendant brokerage firm.

Petitioner (Tr. 172-173), showed to the Court and jury, where an actual loss, stemming from transactions in Control Data Corporation, was shown on Petitioner's Exhibit number 5-P1**, monthly statement dated September 26, 1963 in the number two margin account, date is September 3rd, it says L-s signifying loss, a hundred shares Control Data short, in the amount of $4,667.11.*** (EMPHASIS ADDED)

Petitioner showed to the Court and Jury the figure 4,667.11 matched up opposite September 6 on the chalk. (EMPHASIS ADDED) (TR 376)

* Before the Court of Appeals and transmitted to this Court

** Before the Court of Appeals and certified to this Court

*** A SPECIFIC LOSS RESULTING FROM DEFENDANTS VIOLATION OF §10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 10b-5 promulgated thereunder

Petitioner testified (Tr. 172-173, 376-377), that number 62 on the chalk, number four short account, date April 19, 1963, a short sale of a hundred Control Data Corporation, in the amount of $3,930.44 and that number 86 in the number four short account, purchase in the amount of $8,597.55 and that if you took $8,597.55 and subtracted it from $3,930.44 it gave you $4,667.11.

Petitioner testified (Tr. 173), that between those two transactions there was a purchase shown on the chalk as number 81, in the number two margin account, settlement date June 18th, a hundred shares of Control Data Corporation in the amount of $6,007.46.

Petitioner's attorney informed the Court and jury (Tr. 177) that when there was this first short sale on April 19th, using the settlement date, that the next purchase on June 1, should have been the purchase to cover the short sale and that they should have netted out the two transactions so that the sale of Control Data on July 9, 1963, which the defendant had carried in the margin account, should have been a short sale.

Petitioner testified (Tr. 366), that in accordance with Regulation T, you cannot be long and short the same security and that it has to be netted out. Petitioner testified (Tr. 366), that it was never done that way. (See attached Appendix, Page 139-140)

Petitioner testified (Tr. 375), that the chalk was an exact replica of how the transactions were effected in the monthly statements and that it wasn't netted out on the monthly statements and petitioner didn't net it out on the chalk.

Defendants attorney admitted (Tr. 394), that there was a failure to net out. The District Court stated (Tr. 395), "They didn't net out in fact".

Petitioner testified (Tr. 368), that the losses that are indicated on the chalk are reflected in petitioner's monthly statements.

Petitioner testified (Tr. 149), that the monthly statements indicate a loss of approximately $96,000.00.

Petitioner's chalk, Plaintiff's Exhibit 11-C, the LOSS column marked for Identification, indicates a loss of $96,196.33.

The District Court (Tr. 721-722), sustained the defendants objection to the LOSS columns on Plaintiff's Exhibit 11-A, 11-B, and 11-C and ordered said LOSS columns be removed and marked for Identification.

One of the petitioner's issues before the Court of Appeals was that the District Court erred by sustaining defendants objection to the LOSS columns on Plaintiff's Exhibit 11-A, 11-B, and 11-C. The Court of Appeals rejected petitioner's issue without discussion.

Mr. Thomas J. Staiti, Certified Public Accountant, testified (Tr. 513 to 520), that he received from the petitioner, monthly statements and exhibits which exhibits were the same as the chalk exhibits that was prepared by the petitioner and used during the trial. Mr. Staiti testified (Tr. 516), that he computed the gains and losses to see if they compared with the charts that petitioner had given to him.

(Mr. Thomas J. Staiti, gave petitioner an affidavit which states, in part, that the exhibits accurately reflect the losses on securities transactions within each type of account. Said affidavit was attached to petitioner's motion for master which petitioner filed, Pro se, with the U.S. District Court on Nov. 8, 1968 and which the Court denied on Oct. 8, 1970. Said Motion is in the Appendix, Page 124, before the Court of Appeals and certified to this Court. At the hearing, petitioner's trial attorneys took an exception to the ruling of the Court. Appendix, Page 212e before the Court of Appeals and certified to this Court. This was another of petitioner's issue before the Court of Appeals which was rejected without discussion)

One of the petitioner's issues before the Court of Appeals, was that the District Court erred in sustaining the objection by defendants which prevented petitioner from testifying, before the jury, pertaining to the rescission aspect of the case. Petitioner's attorney (Tr. 171), made an offer of proof that petitioner would have testified, that in regards to the rescission aspect, it would be approximately $150,000. The Court of Appeals rejected petitioner's issue without discussion.

Mr. Thomas J. Staiti, Certified Public Accountant, was prevented from testifying to the total net loss in petitioner's account and petitioner's attorney (Tr. 588-589), made an offer of proof on behalf of the petitioner that, Mr. Staiti would have testified that the total net loss in petitioner's account was $84,746.51* (Plaintiff's Exhibit 42 for Identification).

Petitioner was subjected to phychological violence from the Court and his attorneys.

Prior to the trial, the petitioner was pressured by his attorneys to waive a jury trial. Petitioner has a letter from his trial attorneys which informed petitioner that they were going to waive a jury trial. Petitioner refused to waive a jury trial.

* AFTER DEDUCTING GAINS

The record, in this case, has been transmitted to this Court. A review of the record is frightening, as it indicates a threat to our system of justice.

The District Court's position was made crystal clear, when the District Court stated to the petitioner (Tr. 668) (emphasis added), "That is why you have been able to put into the case $42,000 of damage. I know it was up to fifty-six, but that is going to go out as far as it went in".

The District Court stated (Tr. 548), "As a taxpayer's proposition, on reporting his losses wouldn't it be interesting to see how Mr. Landry reported these things in his income tax returns".

The District Court stated (Tr. 540), "---, and we have scrapped the statements as far as this case is concerned" "So forget the statements". The District Court made these statements, even though defendants had agreed (Tr. 70) to the statements and they were in evidence.

The last day of the trial was on Mar. 10, 1971. Petitioner received a letter from his attorneys, dated Mar. 11, 1971, which states as follows,

"It is my understanding of the Federal Court rules that you have ten days in

which to file for a new trial, and thirty days to file an appeal.

This office will not file either a motion for a new trial or take an appeal on your behalf.

This letter is also notice to you that we have a lien for services on the total amount of the judgement and interest accrued on said judgement. The amount of our lien is one-third of the total interest plus costs".

Petitioner filed a copy of this letter with the U.S. District Court and the Court of Appeals.

Petitioner's attorneys, subsequently, placed an attachment on petitioner's home and savings account for court costs and attorneys fees for representing petitioner in Federal court.

Petitioner's complaint demanded (Tr. 21) court costs and reasonable attorneys fees.

Without going into all of the nightmarish details, petitioner was informed that his home was purchased by the petitioner's trial attorneys for $500.

Petitioner's home has an assessed valuation of over $30,000 with no mortgage.

Petitioner was informed that his attorneys withdrew petitioner's savings account from the bank, which was $3,070.60.

Petitioner's attorneys had used deceit and chicanery in their actions,

Petitioner's attorneys have harrassed petitioner's family by petitioner's attorney's writting a personal letter to petitioner's wife, informing her that she must vacate the property by Nov. 17, 1972.

Petitioner and his family have refused to move from out of their home because the actions taken by these attorneys.

Petitioner has been informed that petitioner's trial attorneys have made a motion to the U.S. District Court for a lien on petitioner's judgement in the amount of approximately $24,000 plus interest.

Petitioner has been notified that the U.S. District Court approved defendants bill of costs totalling $3,771.90.

This includes $2,000 for supersedeas bond, $816.90 for reporters transcript and $995 fromCourt of Appeals.

The District Court approved defendants bill of costs, even though it was defendants who filed a motion to stay petitioner's judgement, and even though defendants requested that petitioner file a transcriot of the trial

proceedings with petitioner's appendix, which petitioner agreed to do.

Petitioner filed 10 copies of the trial transcript with the Court of Appeals and also gave a complete set to the defendants, and defendants bill of costs was approved, even though defendants did not prevail in their appeal.

On Mar. 22, 1971 a letter was sent to Hon. W. Arthur Garrity, Jr., which stated, in essence, that petitioner's attorneys refused to represent petitioner and that petitioner looked to the Court to preserve his rights and that in one case a District Court entered a judgement notwithstanding the verdict when a motion had not been filed.

Just prior to petitioner's oral argument, before the Court of Appeals, petitioner examined Plaintiff's chalk Exhibit 11-A, 11-B, and 11-C and the LOSS columns marked for Identification.

Upon inspection, petitioner noticed that one of the LOSS columns, marked for Identification, had been tampered with, as someone had neatly cut off a section from the bottom of said Exhibit for Identification and the lower section was missing. The part of the LOSS column that was missing contained the figure of 4,667.11, which figure was previously discussed on Page 79-80 of this Petition. The petitioner informed the Court of Appeals about this, in his opening statement and again in his, "Petition for Rehearing" (Appendix C, attached herewith, Page 106-107).

The record indicates clearly that the defendants have always acted in bad faith. As an example, defendants brief before the Court of Appeals, contains the following on Page 8, in regards to defendant Murphy (An excerpt) (emphasis added): "He was compensated primarily by salary although, after being fully registered, he also received commissions at 1/3 the rate for a normal salesman (Tr. 890-1, 974-5). He became a registered representative in November 1962 (Tr. 605). Shortly thereafter, the plaintiff transferred his account to Mr. Murphy."

On Nov. 2, 1972, the petitioner filed a reply brief with the Court of Appeals and in said brief, petitioner again indicated to the Court of Appeals the pages in the trial transcript, where the defendants testified that defendant Murphy had effected securities transactions in petitioner's account, starting in July, 1962 and was also receiving commissions during the period that defendant Murphy was not a registered representative.

Petitioner's brief which was before the Court of Appeals and transmitted to this Court indicates defendants fraudulent activities against petitioner.

During the trial, there was conclusive evidence that the defendants committed perjury (Such as shown on Page 859-860 trial transcript). There was nothing done about this.

There was a preponderance of evidence that defendants violated the anti-fraud provisions of the Federal securities laws and rules and regulations promulgated thereunder, commencing in July, 1962 and continued to engage in a practice in violation thereof. Under Section 29(b), 15 U.S.C. § 78cc the contract is void and implies recovery of damages and rescission (Tr. 411). See attached Appendix, Page 133.

On Mar. 19, 1971, the petitioner sent a letter to District Judge Garrity, which stated, (in part), "I want to call your attention to the copy of the enclosed letter that I have received from my counsel. Although you declined to permit them to withdraw from the case, they refuse to represent me during the critical ten day period following judgement".

A letter was sent on Mar. 22, 1971 to Judge Garrity, suggesting that the District Court enter a judgement notwithstanding the verdict in petitioner's behalf.

The above letters have been transmitted to this Court.

The petitioner's brief before the Court of Appeals and transmitted to this Court, asked the Court of Appeals to order the District Court to enter a judgement notwithstanding the verdict in behalf of petitioner.

Petitioner was subjected to all kinds of harassments from the courts and his attorneys.

Petitioner's attorney (Tr. 557), was driving defendant Winchester to the courthouse (Approximately 40 miles).

Petitioner's attorney wanted to go off the record (Tr. 1158), prior to objecting to denials of the petitioner's requested instructions.

Petitioner's attorneys refused to turn over his files that petitioner had given to them.

One of the petitioner's issues before the Court of Appeals was that petitioner was denied a just, speedy and inexpensive determination of his action and due process of law. The Court of Appeals rejected petitioner's issue without discussion.

The case raises an important matter of principle as to the criteria to be followed in safeguarding the constitutional right guaranteed by the Fourteenth Amendment in the Federal courts and in protecting the federally created statutory rights of the investing public.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgement and opinion of the United States Court of Appeals for the First Circuit.

Respectfully dubmitted,

Norman A. Landry
2 Fairchild Drive
Holden, Massachusetts 01520

Pro se for Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 71-1178

NORMAN A. LANDRY

PLAINTIFF, APPELLANT,

v.

HEMPHILL, NOYES & CO., ET AL.,

DEFENDANTS, APPELLEES.

No. 71-1179

NORMAN A. LANDRY

PLAINTIFF, APPELLEE,

v.

HEMPHILL, NOYES & CO.,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Norman A. Landry, pro se.
James C. Heigham, with whom *Jeffrey L. Heidt*, and *Choate, Hall & Stewart* were on brief, for Hemphill, Noyes & Co., et al.

February 7, 1973

McENTEE, *Circuit Judge*. Among a plethora of other issues, this appeal presents us with a novel question concerning the limitations to be placed upon an implied private action for the violation of Regulation T of the Federal Reserve Board, promulgated pursuant to § 7 of the Securities Exchange Act, 15 U.S.C. § 78g. That question is:

May a customer recover from a broker-dealer his entire market loss on a transaction which has been partially financed on credit extended by the broker-dealer in excess of the limits permitted by the regulation? After briefly summarizing the facts necessary to an understanding of the case, we shall consider that issue, and then turn to the other points which have been raised by the parties on appeal.

I

The Facts

The case arises from the efforts of plaintiff, Norman A. Landry, a former customer of the brokerage house of Hemphill, Noyes & Co., to recover trading and other losses sustained in his securities account with that firm between the years of 1962 and 1964. In addition to the partnership, plaintiff named as defendants Walter Winchester, the manager of the Worcester office of Hemphill, Noyes, and Phillip J. Murphy, a former salesman with that firm. The complaint upon which the action was tried set forth essentially two causes of action. First, the plaintiff alleged that a number of his losing transactions had been made on credit extended by Hemphill, Noyes in excess of the limits permitted by Regulation T. Secondly, plaintiff sought to recover commissions paid to the defendants as a result of the alleged "churning" of his account.[1] The complaint also enumerated various fraudulent practices allegedly committed by the defendants in violation of § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j, and Rule 10b-5

[1] "Churning" is a term used in the securities business to describe the practice whereby a broker-dealer effects transactions in an account which are excessive in light of its size and character, for his own benefit and without regard to his customer's interests. Churning may give rise to a civil cause of action under either § 10(b) or § 15(c) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78o(c). *Lorenz* v. *Watson*, 258 F.Supp. 724 (E.D. Pa. 1966); *Newkirk v. Hayden, Stone & Co.*, CCH Fed. Sec. L. Rep. ¶91,621 (S.D. Cal. 1965).

APPENDIX A

promulgated thereunder. The district court in effect directed a verdict for the individual defendants on the Regulation T claim, and additionally ruled that Hemphill, Noyes was entitled to recover a $9,989 debit balance existing in plaintiff's account after its liquidation in June 1964. The jury returned a verdict in excess of $50,000 against Hemphill, Noyes for its violations of Regulation T, and also found that the plaintiff was entitled to recover varying amounts from all three defendants on the churning claim. The churning verdicts were, however, set aside by the district court on defendants' motion for judgment n.o.v. Alleging numerous errors in the proceedings below, plaintiff appealed, and defendant Hemphill, Noyes countered with a cross appeal.

The evidence at trial revealed that plaintiff is a high school graduate and that he has been engaged in the insulating, painting and carpentry contracting business with his father and brother-in-law since 1946. In the early 1960's he was the president of the corporation and in that capacity earned a salary of $15,000-$25,000 a year. During the same period he derived additional income from his ownership of certain rental real estate.

Landry's first stock market transaction was executed in 1953 through a neighbor, Bernard Bagdis, and he began to do business with Hemphill, Noyes when Bagdis became associated with the firm about two years later. From the time of his initial entry into the market up until 1957 there were fifty or sixty transactions executed in Landry's account. Among these were several transactions on margin, including one short sale on which the plaintiff realized a small profit. In 1957 Landry executed a margain agreement with Hemphill, Noyes which in part provided that the firm might liquidate his account at its discretion and collect from him any remaining debit balance.

From 1957 until January 1962 plaintiff executed his

orders through defendant Walter Winchester. A total of five or six transactions were effected in Landry's account during this period. In January 1962 the account was transferred to William Mitchell, another salesman with the Worcester Hemphill, Noyes office. In the same month Landry wrote a letter to the Research Department of Hemphill, Noyes in which he set forth his current stock holdings in detail and solicited advice as to further investments. In this letter, he described himself as being an "investing stockholder." Landry executed a total of seven transactions through Mitchell in the months during which the latter handled his account.

In July 1962, at the suggestion of Winchester, Landry was introduced to defendant Phillip J. Murphy. At that time Murphy was not a registered representative under the Rules of the New York Stock Exchange, and did not become fully registered until November of that year. Shortly after their initial meeting, Landry transferred his account to Murphy. Plaintiff testified that he had given Murphy discretionary powers over the account and that the latter had guaranteed him a ten percent return on his investment. Murphy denied receiving discretionary powers or making any such promise.

Activity in plaintiff's account started to increase after he began doing business with Murphy. Beginning in March 1963 his transactions started to include a sizeable number of short sales. At about the same time, however, the stock market began to rise to the detriment of those holding short positions. There was conflicting testimony as to whether Murphy advised plaintiff to cover his short sales and thus limit his losses during August 1963.

At some point during January 1964 the defendants became aware that plaintiff's account was undermargined. On May 21, Hemphill, Noyes sent Landry a telegram advising him that an additional deposit of $37,000 was

required, and that his account would be liquidated by selling long positions and covering shorts if payment were not made by May 25. Landry did not comply with this request for additional margin and his account was accordingly liquidated, leaving a debit balance of $9,989.58. Eliminating the sales and cover purchases made in the course of this liquidation, there had been approximately 120 transactions effected in Landry's account between July 1962 and June 1, 1964.

It was undisputed that throughout the relevant period there were serious bookkeeping errors in plaintiff's margin account as maintained by Hemphill, Noyes. The evidence revealed that on fourteen occasions transactions were executed on margin insufficient to meet the requirements of Regulation T.[2] Twelve of these transactions resulted in a loss to the plaintiff. The undermargining of plaintiff's account was apparently due in large part to the failure of Hemphill, Noyes to "net-out," or pair-off, short sales with subsequent long purchases of the same security as required by the regulation.[3] This resulted in a situation where the defendants would pair-off a further sale of the same security with the prior purchase, thus treating it as a long transaction not requiring margin, whereas in reality the plaintiff had no existing position in the security and was therefore actually selling short. At least partially as a result of such errors, the defendant continually failed to demand the necessary cash deposits on transactions which were, for Regulation T purposes, short sales requiring margin.

---

[2] Regulation T is violated when there is insufficient excess credit in an account to properly margin a particular transaction, and the broker-dealer fails either to receive an adequate cash deposit or to liquidate a sufficient number of securities to bring the margin up to the required level within a specified number of days following the transaction. 12 C.F.R. 220.3(b), (e).

[3] *See* 12 C.F.R. 220.3(g), 220.16.

While most of the transactions which violated the margin requirements were made on totally overextended credit, several involved only partial overextensions. The most important of these was a short sale of 100 shares of Xerox on June 13, 1963. On that date there was sufficient excess credit in Landry's account to properly margin a transaction involving 80 shares of that security. Nevertheless, plaintiff's expert witness included the entire transactional loss of $14,000 in his calculation of plaintiff's damages. Defendants requested the court to instruct the jury that, as a matter of law, plaintiff could only recover his loss on that part of a transaction which could not have been made without an illegal extension of credit. Had the court given such an instruction, plaintiff would have been limited to a twenty percent recovery on the Xerox transaction. The instruction was denied, however, and the jury's answer to special interrogatory No. 2 indicated that it had assessed the entire loss against Hemphill, Noyes. Defendant's subsequent motion to amend and alter judgment on these grounds was similarly denied.

II

Regulation T

A. *Partial Overextensions of Credit*

Arguing that no evidence was presented at trial from which the jury could reasonably conclude that defendant's partial overextension of credit was causally related to plaintiff's entire loss on the Xerox transaction, Hemphill Noyes contends that the district court's failure to give its requested instruction was reversible error. While we are in agreement that proof of proximate cause was an indispensable part of plaintiff's burden in this case, *see, e.g.*, *Junger* v. *Hertz, Neumark & Warner*, 426 F.2d 805 (2d Cir.), *cert. denied*, 400 U.S. 880 (1970); *Aubin* v. *H. Hentz & Co.*, 303 F.Supp. 1119 (S.D. Fla. 1969); *Moscarelli* v. *Stamm*, 288 F.Supp. 453 (E.D.N.Y. 1968), we nevertheless

APPENDIX A

conclude that the measure of recovery applied by the jury was proper.

It is well established that a subsidiary purpose of § 7(c) of the Securities Exchange Act is to protect the small investor from the dangers of excessive trading on credit. *See, e.g., Remar* v. *Clayton Securities Corp.*, 81 F.Supp. 1014 (D. Mass. 1949). To the extent that Regulation T accomplishes this purpose, it does so by preventing the investor from engaging in speculative securities transactions which he could not, or would not, enter if the margin requirements were complied with. Thus, in order to show that his loss on a particular transaction was caused by a broker-dealer's violation of Regulation T, the plaintiff must establish that defendant's liberal offer of credit induced him to purchase stock which he would not have otherwise acquired. *See* Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462, 1466, 1471-72 (1966). The plaintiff's proof on this issue, however, must of necessity be something less than definitive. His burden will most often be met by a showing that his financial position was such that he could not, or would not have complied with a request for margin in accordance with the federal rules. Once such a showing has been made with respect to a particular transaction, however, we feel that it would place an unfair burden on the plaintiff to require that he also prove that he would not have entered a different transaction which was, in fact, not made, i.e., the one which could have been legally effected in view of the excess credit then existing in his account. The attractiveness of margin trading arises from the possibility of realizing quick profits on a relatively small capital investment. Thus, it is purely speculative to assume that, because an investor is demonstrably willing to purchase 100 shares of a security on a particular cash payment, he would make the same capital investment in anticipation of the profits

on an 80 share acquisition. We therefore hold that once a Regulation T plaintiff establishes that he has been induced to enter a transaction by an illegal extension of credit, he may recover any losses sustained thereon, regardless of whether a smaller transaction in the same security would have been consistent with the margin requirements. In so holding, we resolve a highly intangible issue of proximate cause "in favor of those the statute is designed to protect." *Cf. Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970). We do not believe that our holding will prove to be inequitable to broker-dealers, since the degree to which credit was overextended will still be relevant to the issue of whether the plaintiff would have entered the disputed transaction regardless of any Regulation T violation. Moreover, to the extent that the defendant can establish the plaintiff's determination to make some purchase or short sale of the relevant security, he will have a good defense to plaintiff's claim for his entire transactional loss.

B. *Innocent Mistakes—Actual Knowledge*

Defendant requested an instruction based on § 6(v) of Regulation T, 12 C.F.R. 220.6(k),[4] that it was not liable for any losses suffered by plaintiff as a result of overextensions of credit made innocently and without any purpose to violate the margin requirements. Based upon the following facts, defendant argues that the district court's refusal to give such an instruction was error.

It was established at trial that during the years in

[4] That section reads as follows:

"(k) *Innocent mistakes.* If any failure to comply with this part results from a mechanical mistake made in good faith in executing a transaction, recording, determining, or calculating any loan, balance, market price, or loan value, or other similar mechanical mistake, the creditor shall not be deemed guilty of a violation of this part if promptly after the discovery of such mistake he takes whatever action may be practicable in the circumstances to remedy such mistake."

question the Worcester Hemphill, Noyes office had no margin clerk, and that all Worcester margin accounts, including the plaintiff's, were assigned to a margin clerk in the New York office, Charles Carlough. Carlough had been a reliable Hemphill, Noyes employee since 1946, but during the years 1962-64 his abilities were seriously affected by an illness which eventually culminated in his death. Defendant's violations of Regulation T were due to the serious bookkeeping errors made by Carlough in maintaining plaintiff's margin account. There was no evidence tending to show that defendant's overextensions of credit were in any way wilful, or made with fraudulent intent.

While § 6(v) is entitled "Innocent Mistakes," its text speaks solely in terms of a

> "*mechanical* mistake made in . . . executing a transaction, recording, determining, or calculating any loan, balance, market price, or loan value, or other similar *mechanical* mistake . . . ." (Emphasis added.)

Thus it is clear that the section is intended to exempt from liability only computational and similar errors, and does not apply across the board to all violations made in good faith and without specific intent. The testimony of witnesses Schwartz and Lanigan clearly revealed that the errors in plaintiff's margin account were not merely computational in nature. In addition to the aforementioned failure to "net-out" transactions, these errors included the omission of a large short sale from the defendant's margin calculations, and the improper release of certain funds from plaintiff's account. Since these errors did not fall within the meaning of § 6(v), the district court properly declined to give defendant's requested instruction.[5] *Cf.*

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[5] *Goldenberg* v. *Bache & Co.*, 270 F.2d 675 (5th Cir. 1959), the only case cited by defendant, was decided under an earlier version of the regulation which omitted the word "mechanical," and is therefore not relevant here. *See* 270 F.2d at 678, n.3.

Gregory-Massari, Inc. v. *Purkitt*, 1 Cal. App.3d 968, 82 Cal. Rptr. 210 (Ct. App. 1969).

Defendant also requested an instruction based on § 29(c) of the Securities Exchange Act, 15 U.S.C. § 78cc(c), which provides in relevant part:

> "Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit . . . unless at the time of the making of such loan or extension of credit . . . the person making such loan or extension of credit . . . shall have actual knowledge of facts by reason of which the making of such loan or extension of credit . . . is a violation of the provisions of this title or any rule or regulation thereunder. . . ."

Since the defendant was fully aware of all the transactions which took place in plaintiff's account, it had actual knowledge of facts which, upon reasonable inquiry, would have clearly revealed its violations of Regulation T. The requested instruction was therefore properly denied.

C. *Defendant's Counterclaim*

As discussed in Part I, *supra*, the district court in effect directed a verdict for defendant on its counterclaim for the debit balance existing in plaintiff's account after it was closed out in June 1964. The counterclaim was based on a provision in Landry's margin agreement with Hemphill, Noyes by which the plaintiff agreed to pay any deficiency resulting from such a liquidation. Plaintiff appeals from the district court's action on the grounds that, in view of defendant's violations of Regulation T, its rights under the margin agreement were voided by § 29(b) of the Securities Exchange Act, 15 U.S.C. § 78cc(b).[6] Leaving aside

[6] Section 29(b) of the Securities Exchange Act provides in relevant part: "Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract

the question of whether the margin agreement or its performance involved a violation of the Act within the meaning of that section, we find plaintiff's argument to be wholly unsupportable in the present context. In calculating his damages on the Regulation T claim, plaintiff included the losses sustained on transactions made by the defendant in liquidating his account. Since these transactions resulted in the final deficiency, disallowing the counterclaim, while permitting an award of damages for the Regulation T losses, would in effect grant a double recovery to the plaintiff. Double recoveries of this nature are clearly prohibited by § 28(a) of the Securities Exchange Act, 15 U.S.C. § 78bb(a).[7]

D. *Method of Calculating Plaintiff's Loss*

Plaintiff also appeals from the district court's ruling as to the method by which his damages under Regulation T were to be calculated. The court ordered that the losses be computed on a "netting-out" basis, i.e., by pairing a short sale with the first purchase of the same security effected thereafter.[8] Plaintiff argues, however, that since the defendant did not, in fact, "net-out" transactions in this manner, his losses should be determined by using the transactional pairings which appear in his monthly statements. Upon examination, plaintiff's reason for preferring

. . . heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, . . ."

[7] That section provides in pertinent part:

". . . , but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of . . . ."

[8] As discussed in Part I, *supra*, "netting-out" is required for purposes of Regulation T.

this method of calculation becomes immediately apparent. Simplifying the facts to some degree, a typical series of transactions on which the plaintiff lost money conformed to the following pattern. Plaintiff would sell a particular security short, followed by a purchase and further sale of the same security, leaving him with a net short position which would then be eliminated by a cover purchase. Due to its erroneous bookkeeping, the defendant paired the first transaction with the fourth, and the second with the third, instead of following the netting-out principles prescribed by Regulation T. Because the market was continually rising, however, defendant's accounting procedures had the effect of showing a greater paper loss to plaintiff than he actually sustained, since during the period between the second and third transactions he had no net position in the security, and was thus immune to any rise or decline in its price. It is these so-called "losses" which plaintiff now argues he was entitled to recover. Regardless of the figures shown on the monthly statements, the district court was clearly correct in refusing to allow so inequitable a result. Defendant's failure to net-out transactions was significant only in regard to the role which such errors played in the undermargining of plaintiff's account; it did not operate to estop defendant from showing that a portion of plaintiff's claimed damages was purely imaginary.

E. *Dismissal of Individual Defendants*

Since defendants Winchester and Murphy were not personally responsible for maintaining plaintiff's margin account, and since there was no evidence to show that they had actual knowledge of any violations of Regulation T, the district court did not err in dismissing the claim against these defendants.

III

Churning

We now turn to plaintiff's contention that the district court erred in granting defendants' motion for judgment n.o.v. on his churning claim. While we accept the jury's apparent conclusion that defendants exercised the necessary control over plaintiff's account, we are nevertheless convinced that there was insufficient evidence to support a finding that the account had been overtraded. We therefore affirm the decision below on this issue.

The desultory bits of evidence upon which the churning claim was based may be summarized very briefly. First, in January 1962 plaintiff wrote a letter to the Hemphill, Noyes Research Department in which he described himself as an "investing stockholder." Secondly, although plaintiff made only five or six transactions between 1957 and January 1962, volume in his account increased to approximately 120 transactions during the period here in question.[9] Most of these transactions were either margin purchases or short sales, and were therefore speculative in nature. While this evidence might suffice to support a churning verdict had it been established that plaintiff's investment aims were solely related to the production of dividend income and the conservation of principal, we think it to be irrefutable that, notwithstanding his January 1962 letter, plaintiff's holdings with Hemphill, Noyes assumed the character of a trading account shortly after July of that year. We base this conclusion on plaintiff's uncomplaining acceptance of what was done for him by defendants over a twenty-two month period. It was uncontroverted that Landry regularly received confirmation slips and monthly statements from Hemphill, Noyes setting forth the full details of every transaction entered, and that with one

[9] This figure does not include the close-out transactions occurring on June 1, 1964.

minor exception relating to a mistaken transaction in April 1963, he at no time registered any complaints with the defendants concerning the manner in which his account was being handled. Given plaintiff's obvious experience in the stock market,[10] we hold as a matter of law that he must have realized the inconsistency between his alleged investment intent and what was actually occurring in his account; he is therefore estopped from arguing, for purposes of his churning claim, that he was an investor rather than a trader. *See Hecht* v. *Harris, Upham & Co.*, 283 F.Supp. 417, 428-31 (N.D. Cal. 1968), *aff'd*, 430 F.2d 1202 (9th Cir. 1970); *cf. Walter S. Grubbs*, 28 SEC 323, 329 (1948).

In light of the fact that a greater volume of activity will normally be expected in a trading account, *see* Note, Churning by Securities Dealers, 80 Harv. L. Rev. 869, 875 (1967), the paucity of evidence offered by the plaintiff on this issue becomes particularly striking. No expert testimony was introduced as to the turnover rate of plaintiff's account,[11] the percentage of transactions which were reversed within a short period of time, the proportion of

[10] Among other indications of plaintiff's sophistication in securities matters, the record reveals that he had been trading on margin since the 1950's and had made a profitable short sale in 1955; that he subscribed to various financial publications such as *Barron's* and the *Wall Street Journal*; that in 1962 he solicited investment advice from the Research Department of Hemphill, Noyes and from Babson's Institute; and that plaintiff used his retained confirmation slips to prepare a detailed list of his current stock holdings for defendant Murphy, including calculations of profits and losses on various transactions. In view of these facts, we feel that it would stretch credulity too far to say that plaintiff was unaware that the large number of margin purchases and short sales being effected in his account were inconsistent with the aims of an "investing stockholder."

[11] The turnover rate in an account is generally computed by dividing the cost of all transactions made in the account during the period under consideration by the average investment. The average investment is determined by dividing the cumulative total of the net investment at the end of each month by the number of months involved. *See* Note, Churning by Securities Dealers, *supra* at 875.

defendants' profits attributable to commissions paid by plaintiff, or the volume of activity which would be considered normal in an account such as plaintiff's. *See* Note, Churning by Securities Dealers, *supra*, at 875-78. Instead, the jury was merely presented with the raw data concerning plaintiff's transactions, and then asked to conclude that the trading in his account had been "excessive." Under these circumstances, the court below had no alternative but to grant defendants' motion for judgment n.o.v.

IV

Separate Claim Form for Fraudulent Practices

Plaintiff contends that the district court erred in failing to submit to the jury a separate claim form with respect to certain allegedly fraudulent practices committed by the defendants in violation of § 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. Along with other examples of defendants' supposedly fraudulent conduct which we do not find worthy of mention, this objection is based upon defendant Murphy's alleged guarantee of a ten percent return on plaintiff's investment. Since plaintiff made no attempt to establish the relationship of this guarantee to any of his specific losses, the district court acted properly in refusing to submit this claim to the jury.

We have carefully considered the numerous other contentions raised by the parties, which we reject without discussion.

Affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1178

NORMAN A. LANDRY,
Plaintiff, Appellant
v.
HEMPHILL, NOYES & CO., ET AL.,
Defendants, Appellees

No. 71-1179

NORMAN A. LANDRY,
Plaintiff, Appellee,
v.
HEMPHILL, NOYES & CO., ET AL.,
Defendants,

HEMPHILL, NOYES & CO.,
Defendant, Appellant

JUDGEMENT

Entered: February 7, 1973

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by plaintiff pro se, and counsel for defendants.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgement of the District Court is affirmed.

APPENDIX B

By the Court:

DANA H. GALLUP, Clerk

By: /s/Francis P. Scigliano
Chief Deputy Clerk

(cc: Mr. Landry and Mr. Heigham.)

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 71-1178

NORMAN A. LANDRY
Plaintintiff, Appellant

vs.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY
Defendants, Appllees

PETITION FOR REHEARING

Norman A. Landry, Pro se
2 Fairchild Drive
Holden, Massachusetts 0152

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PETITION FOR REHEARING

Norman A. Landry, Plaintiff, Appellant respectfully petition this Honorable Court to grant a rehearing with respect to its decision of February 7, 1973, affirming the District Courts actions. As required, per local Rule 9, plaintiff sets forth below the reason why the argument was not presented before with the explanation of why it was not.

During the trial, plaintiff had testified that he made the large chalk exhibits namely, Plaintiff's Exhibit 11-A, 11-B, and 11-C and that said Exhibits was a true reflection of the manner in which securities transactions were effected in plaintiff's account and the losses as a result of said transactions as reflected on the monthly statements received by the plaintiff, through the mails, from defendant brokerage firm, Hemphill, Noyes & Co.. Defendants objected to the Loss columns on Plaintiff's Chalk Exhibit 11-A, 11-B, and 11-C and the District Court sustained defendants objection and ordered, just prior to the juries deliberations, said Loss columns to be removed from said Exhibits and the loss columns were marked for Identification.

A few minutes prior to plaintiff's presentation of his oral argument, before the Court of Appeals, plaintiff looked over Plaintiff's large Chalk Exhibit 11-A, 11-B, and 11-C and the Loss columns marked for Identification. Upon inspection,

plaintiff observed that one of the Loss columns which had been marked for Identification, had been tampered with, as someone had neatly cut off a section from the bottom of said Exhibit for Identification and the lower section was missing. (The Court of Appeals will have to refer to Plaintiff's Exhibit 11-B, the Loss column marked for Identification which was filed with the Plaintiff's Appendix and contains the complete Loss column as it was originaly)

The part of the Loss column, that was cut off by someone, was essential, as there was indicated on same a figure of 4,667.11 and this same figure was also indicated on plaintiff's monthly statement, Plaintiff's Exhibit 5-Pl, and on said Exhibit, it was designated as a loss, this would indicate that Plaintiff's Exhibit 11-A, 11-B, and 11-C and the Loss column marked for Identification was a true reflection of the plaintiff's monthly statements.

Plaintiff had intended, by his oral argument, to supplement his brief on the subject matter as to the only manner by which to calculate the actual losses sustained by the plaintiff, but as one of the most important Loss column, which had been marked for Identification, was not in its entirety, as it was originaly, resulted in plaintiff curtailing the amount of time he had alloted on said subject and as a consequence, plaintiff omitted to inform the Court of certain vital facts.

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Plaintiff will cover, in this petition, what he had omitted and will take this opportunity to combine it with a discussion of the printed opinion of the Court of Appeals.

Plaintiff, Appellant reserves his argued position as to each of the points of appeal, but in this petition address himself solely to that feature of the decision wherein he believes the Court may be convinced its results is based upon the application of incorrect legal principles and facts.

Therefore this petition is devoted to convincing this court that it has erred in its determination of the major issues put to it on appeal.

The main issue in plaintiff's complaint alleged that the defendants willfully violated the anti-fraud provisions of the Federal securities laws and there is a preponderance of evidence, at the trial, which supported the allegations and it is discussed extensively in plaintiff's brief and reply brief.

On Page 1 and Page 2 of the printed opinion, the Court states, "Among a plethora of other issues, this appeal presents us with a novel question concerning the limitations to be placed upon an implied private action for the violation of Regulation T of the Federal Reserve Board, promulgated pursuant to § 7 of the Securities Exchange Act, 15 U.S.C. § 78g. That question is: May a customer recover from a broker-dealer his entire market loss on a transaction which has been partially financed on credit extended by the

broker-dealer in excess of the limits permitted by the regulation? After briefly summarizing the facts necessary to an understanding of the case, we shall consider that issue, and then turn to the other points which have been raised by the parties on appeal".

Plaintiff states that the above should have been the following: "A private party who has been injured as a result of a violation of the anti-fraud provisions of the 1934 and 1933 Acts has a private right of action implied from the Federal statutes for any damages occasioned as a result of such action".

Plaintiff's complaint has a claim that defendants engaged in fraudulent and deceitful activities with respect to the plaintiff in connection with the sales of securities by the use of telegraphic communication and other instruments of interstate commerce and by tne use of the mails, in violation of Section 17(a) of the Securities Act of 1933, as amended, 48 Stat. 84, 15 U.S.C. § 78q, and by using or employing deceptive devices with respect to plaintiff in connection with the purchase or sale of securities by the use of telegraphic communication and other instrumentalities of interstate commerce and by the mails and the facilities of the New York Stock Exchange, in violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, 48 Stat. 891, 15 U.S.C. § 78j, as well as the laws of the Commonwealth of Massachusetts. Plaintiff entrusted the hand-

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ling of his stock brokerage account to defendant Murphy when, unknown to the plaintiff, defendant Murphy was not a registered representative authorized by the rules of the New York Stock Exchange to handle customers' stock brokerage accounts, and had not even taken the training course and the examination prescribed by Hemphill, Noyes and the New York Stock Exchange as requirements for registration asa registered representative. In the ourchase for and carrying in plaintiff's account of securities registered on the New York Stock Exchange, Hemphill, Noyes extended credit to plaintiff in excess of the limits permitted under Section 7 of the Securities Exchange Act of 1934, as amended, 48 Stat. 886; 15 U.S.C. § 78g and Rule 431 of the New York Stock Exchange. The plaintiff's complaint listed other items which also resulted in defendants violating the anti-fraud provisions of the Federal securities laws. The conclusion of plaintiff's complaint stated that by the conduct enumerated in the complaint, defendants were guilty of a fiduciary relationship, willful misconduct, gross negligence, or negligence towards plaintiff, whose trust and confidence they had successfully solicited. As a result of the foregoing deceitful, fraudulent, negligent and otherwise illegal conduct of the defendants, plaintiff has suffered loss and damages in the following amounts: (The complaint then went on to list the monetary loss and damages demanded).

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Plaintiff's main issue, in his complaint, was that defendants violated the anti-fraud provisions of the 1934 and 1933 Act.* There was a preponderance of evidence, at the trial, which made it abundantly clear that defendants were guilty of willfully violating the 1934 and 1933 Acts. The defendant's own testimony, at the trial, and the evidence, clearly indicates that the defendants wrondoing had been intentional and deliberate, and had the character of outrage frequently associated with crime.

The main issue in the plaintiff's brief (See Plaintiff's Brief, Page 101, Conclusion) was in regards to the anti-fraud provisions of the 1934 and 1933 Acts.

It is well established that a private party who has been injured as a result of the anti-fraud provisions of the 1934 and 1933 Acts has a private right of action implied from the Federal statutes for any damage occasioned as a result of such violation. See, e.g., Taylor v. Janigan, 212 F. Supp. 794, 800-801 (D. Mass. 1962), aff'd sub nom. Janigan v. Taylor, 344 F. 2d 781 (1st Cir, 1965); Fratt v. Robinson, 203 F.2d 627, 631-633 (9th Cir, 1953); Pfeffer v. Cressaty, 223 F. Supp. 756 (S. D.N.Y. 1963); Osborne v. Mallory, 86 F.

*(Plaintiff's issues seek recovery of actual losses plus interest, payment of commissions plus interest, rescission plus interest, punitive damages and costs plus reasonable attorneys fees)

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Supp. 869, 878-879 (S.D.N.Y. 1949), 3 Loss, Securities Regulations 1763.

On Page 2 of the printed opinion, the Court states (In Part): "The complaint upon which the action was tried set forth essentially two causes of action. First, the plaintiff alleged that a number of his losing transactions had been made on credit extended by Hemphill, Noyes in excess of the limits permitted by Regulation T. Secondly, plaintiff sought to recover commissions paid to the defendants as a result of the alleged "churning" of his account".

The Court is in error, as the first cause of action is as indicated on Page 3 - 4 - 5 of this Petition an as indicated in plaintiff's complaint and brief.

On Page 9 of the printed opinion, the Court states (In Part): "There was no evidence tending to show that defendant's overextensions of credit were in any way wilful, or made with fraudulent intent".

The Court is in error, as there is a preponderance of evidence, at the trial, that showed that defendant's overextensions of credit were wilful and were made with a fraudulent intent. Defendant Winchester testified (Tr. 639-640) that during the period 1962 to 1964, he was in charge and had the responsibility for all the men in his office and the representatives and everybody in his office were under his control and under his supervision at all times. Defendant Winchester testified (Tr 634) that he was

familiar with the term long and short and Regulation T. Defendant Winchester testified (Tr 635) that he examined the plaintiff's monthly statements each month. Defendant Winchester testified (Tr 630) that he was familiar with margin accounts and that the method that he kept margin accounts or he and his men kept margin accounts coincided with the method by which New York kept them. Defendant Murphy testified (Tr 889) that everybody was instructed in margin procedures. Defendant Winchester testified (Tr 631) that defendant Murphy would begin to maintain a margin or a special miscellaneous account, and this was done from the first transaction in the margin account until it was closed. Mr. Joseph Shwartz, from the U. S. Securities and Exchange Commission testified (Tr 397-399) that a special miscellaneous account may be described as a reservoir of accumulated funds and indicates the amount of funds available on that date in question for any transaction which the customer wants to make. Defendant Winchester testified (Tr 706-707) (emphasis added) that the maintaining of the S.M.A. account on the margin was the responsibility of Hemphill, Noyes, the salesman, and the manager and that in fact, where the credit was extended to the plaintiff, that he and defendant Murphy should have been aware that the credit was extended. Defendant Winchester testified (Tr 624) that each salesman has to know his customer, and each salesman, every margin account that they

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have, they have a pretty fair idea of how the account stands (emphasis added). Defendant Winchester testified (Tr 691-858 to 860) that it was in January 24, 1964 when it was first brought to his attention that plaintiff's account was undermargin. Plaintiff testified (Tr 132 - 133) that shortly after Jan. 25, 1964, he had a conversation with defendant Murphy who informed the plaintiff, "You haven't got a thing to worry about. You've got plenty of money in the account. Don't worry about a thing". Mr. Shwartz, from the S.E.C., testified (404 - 409 to 411) that according to Regulation T, when a transaction is effected that requires a deposit and said deposit is not made, then the broker is obliged to sell or liquidate securities within four-day period and that in the event that the broker did not liquidate within the time specified, it would be a violation of Regulation T. Defendants conceded (Tr 862) that no cash was put in in January, February, March, April, or May and plaintiff's monthly statements (Plaintiff's Exhibit 6-B to 6-J) indicates no liquidation of any securities. Defendant Winchester testified (Tr 862) (emphasis added), that even though he knew that plaintiff's account was under margin, a purchase was made in plaintiff's account in April. The defendants knew that plaintiff's account was over extended credit, and yet, they continue to effect securities transactions in plaintiff's account. Plaintiff testified (Tr. 339) that a letter of com-

plaint was sent out on May 18, 1964 to Hemphill, Noyes and that on May 21, 1964 he received a Telegram from defendant Hemphill, Noyes & Co. demanding $37,000 (Plaintiff's Exhibit 19) and that subsequently plaintiff's entire account was liquidated and then subsequently (Tr 135) plaintiff became disabled.

Mr. Joseph Shwartz, from the U. S. Securities and Exchange Commission testified (Tr 506) that on one day the plaintiff's account had a deficiency of $93,001.02, that on another day (Tr 473-474) there was a deficiency of $29,067, that on another day (Tr 479) there was required $43,103.53, and that on another day (Tr 480) there was a deficiency of $47,818.98.

On Page 11 of the printed opinion, the Court states under heading, "D. Method of Calculating Plaintiff's Loss", the following (In Part): "The court ordered that the losses be computed on a "netting out" basis, i.e., by pairing a short sale with the purchase of the same security effected thereafter".

The District Court was in error because of the reasons stated below:

Number 1 - One of the Exhibits, that was used during the trial, which purports to show short sales, was defendants Exhibit P, and said Exhibit purports to show the manner in which transactions were effected in plain-

tiff's account and said Exhibit indicates some transactions as being effected as "short" sales when, in fact, they were actually effected as "long" sales. Staiti and Lanigan testified to losses as if the transactions were effected in the manner as shown on Defendants Exhibit P. Plaintiff stated (Tr 670) to the District Court, "and there is a continuation of the same fraud today". There is evidence (Tr 687 - 690), presented before the jury, of what Mr. Shwartz, from the S.E.C., would have testified to in regards to transaction that was effected on June 13, 1963 (Settlement Date June 19, 1963 - Tr 687), which was stipulated to by the defendants and Plaintiff's Exhibit 43 marked for Identification and then subsequently (Tr 767) defendants re-offered plaintiff's Exhibit 43 and said Exhibit was marked and received in evidence. Plaintiff's Exhibit 43, indicates that the transaction of June 13, 1963 in the amount of $20,153, that Actually, it had been effected as a "long" sale. Defendants Exhibit P, item 71, purports to indicate said

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transaction as a "short" sale. Defendants (Tr 758) stated for the record that this transaction is indicated, margin number 82 (This refers to Plaintiff's Exhibit 11-B, which indicates that this transaction was effected in the margin account. Plaintiff testified (Tr 375) that this was a long sale in margin account. Plaintiff testified (Tr 348) that a short sale has to be made in the short account. This indicates that the manner in which securities transactions and losses from said transactions as shown on Plaintiff's Exhibit 11-A, 11-B, and 11-C and the Loss columns marked for Identification is an accurate reflection of plaintiff's monthly statements that he received through the mails from Hemphill, Noyes. As indicated by a preponderance of evidence, Defendants Exhibit P was a sham.

Number 2 - The District Court order was, "That losses were to be computed on the basis of the difference between the short sale and the first purchase thereafter, regardless of how the transactions were entered on the account, as whether

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having occured in the number two account or number one account or number four account (Tr. 1142). The District Court is in error, as the proper method of calculating the actual losses sustained by the plaintiff, is described by the testimony of Thomas J. Staiti. Mr. Thomas J. Staiti, Certified Public Accountant, testified (Tr 513 to 520) as to the manner in which he audited plaintiff's monthly statements in regards to calculating the actual gains and losses sustained by the plaintiff as a result of securities transactions as indicated on plaintiff's monthly statements from January 1962 to June 1964. Mr. Staiti testified that he set up work sheets for the number one cash account, number two margin account and number four short account and that he isolated the transactions into various accounts and computed the gains and losses as they appeared by account.

As can be seen, above, the order of the District Court as regards to the method of calculating plaintiff's loss differs from the method used by Thomas J. Staiti, Certified Public Accountant.

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For the number of reasons given above, the method of calculating plaintiff's losses as indicated by the District Court order, would not reflect the actual losses sustained by the plaintiff and therefore the order of the District Court is in error and the Court of Appeals is also in error in supporting the position of the District Court.

Mr. Thomas J. Staiti, Certified Public Accountant, testified (Tr 513 to 520), at the trial, that he received from the plaintiff, in the spring or early summer of 1968, three charts or exhibits identified as Consolidated Statement, number one cash account, number two margin account, and number four short account, of all purchase and sale transactions on the account of Norman A. Landry with Hemphill, Noyes and Company from January 1, 1962 through June 1, 1964. Defendants agreed that said exhibits that Thomas J. Staiti received from the plaintiff in 1968 were copies of plaintiff's large chalk exhibits used during the trial namely, Plaintiff's Exhibit 11-A, 11-B, and 11-C (Mr. Thomas J. Staiti, gave plaintiff an affidavit which stated that plaintiff's exhibits accurately reflected the losses on securities transactions within each type of account, as presented on photostatic copies of statements from Hemphill, Noyes & Co. (See Appendix Page 130). Plaintiff filed said affidavit with motion for master on Oct. 11, 1968 and said motion was denied, almost two years later, on Oct. 8, 1970. This is another

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of plaintiff's many issues).

The District Court was in error and the Court of Appeals is in error in supporting the action of the District Court, as indicated on Page 12 of the printed opinion, as there was a preponderance of evidence, at the trial, and indicated in plaintiff's brief, that defendant Winchester and Murphy were personally responsible for maintaining plaintiff's margin account, showing that they had actual knowledge of violations of Regulation T (For examples; See Page 7, 8 and 9 of this Petition).

On Page 13 of the printed opinion, the Court states (In Part): "While we accept the jury's apparent conclusion that defendants exercised the necessary control over plaintiff's account, we are nevertheless convinced that there was insufficient evidence to support a finding that the account had been overtraded".

The Court is in error, as there was a preponderance of evidence that plaintiff's account was overtraded. Plaintiff testified (Tr 187) that his salary, during the period of complaint, had a range between $15,000 and $25,000 and that he gave (Tr 66-67-243- discretionary powers to defendant Murphy. Defendant Murphy testified (Tr 903-904), as to transactions he effected in plaintiff's account when defendant Murphy was not a registered representative, all effected with the approval of defendant Winchester. This was a violation of New York Stock Exchange Rules and agreement on all confirmation

slips. There was also testimony by Mr. Shwartz, from the S,E.C., that there was a defeciency in plaintiff's account, on one day alone, of $93,001.02. All of the transactions from 1962 through 1964 would not have taken place in plaintiff's account had the defendants scrupulously followed the Federal securities laws and New York Stock Exchange Rules. Plaintiff testimony indicates that at the time, he was not aware or made aware that defendants were violating the Federal securities laws and New York Stock Exchange Rules. Defendant Winchester testified (Tr 601) that he handled plaintiff's account from 1957 to 1962 and that there were five to six transactions during that whole period. Defendant Winchester testified (Tr 703) that there were 76 transactions in plaintiff's account fromAugust 1962 to August 1963. There was uncontroverted testimony (Tr 146) by the plaintiff that from Jan. 1962 to the end of May 1964 the total transactions amounted to $1,200,000 or $1,210,000. Defendant Murphy testified (Tr 964) that he didn't have to make inquiries as to plaintiff's financial affairs.

The jury found by a preponderance of evidence that defendants were guilty of "churning" plaintiff's account in violation of the anti-fraud provisions of the Federal securities laws. The District Court granted defendants motion for judgement notwithstanding the verdict on plaintiff's "churning" claim, not because

the plaintiff's account was not "churned" in violation of the Federal securities laws, but because the District Court (Appendix Page 250d) had reservations as to whether the liability be jointly or severally. The District Court erred in refusing to instruct the jury of plaintiff's requested instructions Nos. 4, 5 and 6 (Appendix Page 236) (Another of plaintiff's issues) which would have had the effect of making defendants liable jointly and severally in conformity with Section 20(a) of the Securities Exchange Act of 1934.

On Page 15 of the printed opinion, the Court states (In Part): "Along with other examples of defendants supposedly fraudulent conduct which we do not find worthy of mention, etc.".

There was a preponderance of evidence, at the trial, of numerous wilful flagrant violations by the defendant of g 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder that it would fill another 30 pages to list all of the violations and as the plaintiff is limited to 15 pages in his Petition, plaintiff respectfully request the Court to reread plaintiff's brief.

(Plaintiff will site an example: Mr. Joseph Shwartz, from the S.E.C., testified (Tr 455) that the transaction of June 19, 1963 that was effected in plaintiff's account should have been effected as a short sale. The transaction of June 19, 1963 is settlement date and

June 13, 1963 is a trade date (Tr 687). Plaintiff's Exhibit 43 (Tr 767) was marked in evidence, and stipulated to by the defendants, and said Exhibit indicates that this transactions was actually effected as a "long" sale. In U.S. v. Peltz, U.S. Court of Appeals 2nd Circuit, No. 34578, Oct. 19, 1970 the defendant was affirmed guilty of violating § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 where the defendant ordered sale of securities long whereas in fact they were short)

CONCLUSION

For the foregoing reasons, I respectfully submit that this petition for rehearing should be granted.

Norman A. Landry, Pro se
2 Fairchild Drive
Holden, Massachusetts 01520

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PROOF OF SERVICE

I, Norman A. Landry, Pro se for the plaintiff, appellant herein, hereby certify that I caused to be delivered by hand to the office of James C. Heigham, Esquire, counsel for the defendants, appellees, 28 State Street, Boston, Massachusetts 02109, on Feb. 20, 1973, two copies of, "Petition For Rehearing".

_____

Norman A. Landry, Pro se

2 Fairchild Drive

Holden, Massachusetts 01520

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1178.

NORMAN A. LANDRY,
Plaintiff, Appellant,
v.
HEMPHILL, NOYES & CO., ET AL.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
McENTEE and CAMPBELL, Circuit Judges.

ORDER OF COURT

Entered March 13, 1973

It is ordered that the petition for rehearing filed herein on February 20, 1973, be, and the same hereby is, denied.

By the Court:

/s/ Dana H. Gallup
Clerk.

(cc: Messrs. Landry and Heigham)

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AUTHORITIES:

Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. §78g, 48 Stat. 886

Margin requirements

Sec7. (a) For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Governors of the Federal Reserve System shall, prior to the effective date of this section and from time to time, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security) registered on a national securities exchange. For the initial extension of credit, such rules and regulations shall be based upon the following standard: An amount not greater than whichever is the higher of-

(1) 55 per centum of the current market price of the security, or

(2) 100 per centum of the lowest market price of the security during the preceding thirty-six calendar months, but no more than 75 per centum of the current market price.

75 per centum of the current market price. Such rules and regulations may make appropriate provision with respect to the carrying of undermargined accounts for limited periods and under specified conditions; the withdrawal of funds or securities; the substitution or additional purchases of securities; the transfer of

accounts from one lender to another; special or different margin requirements for delayed deliveries, short sales, arbitrage transactions, and securities to which paragraph (2) of this subsection does not apply; the bases and the methods to be used in calculating loans, and margins and market prices; and similar administrative adjustments and details. For the purposes of paragraph (2) of this subsection, until July 1, 1936, the lowest price at which a security has sold on or after July 1, 1933, shall be considered as the lowest price at which such security has sold during the preceeding thirty-six calendar months.

(b) Notwithstanding the provisions of subsection (a) of this section, the Board of Governors of the Federal Reserve System, may, from time to time, with respect to all or specified securities or transactions, or classes of securities, or classes of transactions, by such rules and regulations (1) prescribe such lower margin requirements for the initial extension or maintenance of credit as it deems necessary or appropriate for the accommodation of commerce and industry, having due regard tothe general credit situation of the country, and (2) prescribe such higher margin requirements for the initial extension or maintenance of credit as it deems necessary or appropriate to prevent the excessive use of credit to finance transactions in securities.

(c) It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer-

(1) On any security (other than exempted security) registered on a national securities exchange, in contravention of the rules and regulations which the Board of the Federal Reserve System shall prescribe under subsections (a) and (b) of this section.

(2) Without collateral or on any collateral other than exempted securities and/or securities registered upon a national securities exchange, except in accordance with such rules and regulations as the Board of Governors of the Federal Reserve System may prescribe (a) to permit under specified conditions and for a limited period any such member, broker, or dealer to maintain a credit initially extended in conformity with the rules and regulations of the Board of Governors of the Federal Reserve System, and (B) to permit the extension or maintenance of credit in cases where the extension or maintenance of credit is not for the purpose of purchasing or carrying securities or of evading or circumventing the provisions of paragraph (1) of this subsection.

(d) It shall be unlawful for any person not subject to subsection (c) to

extend or maintain credit or to arrange for the extension or maintenance of credit for the purpose of purchasing or carrying any security registered on a national securities exchange, in contravention of such rules and regulations as the Board of Governors of the Federal Reserve System shall prescribe to prevent the excessive use of credit for the purchasing or carrying of or trading in securities in circumvention of the other provisions of this section. Such rules and regulations may impose upon all loans made for the purpose of purchasing or carrying securities registered on national securities exchanges limitations similar to those imposed upon members, brokers, or dealers by subsection (c) of this section and the rules and regulations thereunder. This subsection and the rules and regulations thereunder shall not apply (A) to a loan made by a person not in the ordinary course of his business, (B) to a loan on an exempted security, (C) to a loan to a dealer to aid in the financing of the distribution of securities to customers not through the medium of a national securities exchange, (D) to a loan by a bank on a security other than equity security, or (E) to such other loans as the Board of Governors of the Federal Reserve System shall, by such rules and regulations as it may deem necessary or appropriate in the public interest or for the protection of investors, exempt, either unconditionally or

upon specified terms and conditions or for stated periods, from the operation of this subsection and the rules and regulations thereunder.

(e) The provision of this section or the rules and regulations thereunder shall not apply on or befire July 1, 1937, to any loan or extension of credit made prior to the enactment of this title or to the maintenance, renewal, or extension of any such loan or credit, except to the extent that the Board of Governors of the Federal Reserve System may by rules and regulations prescribe as necessary to prevent the circumvention of the provisions of this section or the rules and regulations thereunder by means of withdrawals of funds or securities, substitutions of securities, or additional purchases or by any other device.

SECTION 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, 48 Stat. 891

Regulation of the Use of Manipulative and Deceptive Devices

Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention

of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SECTION 17(a) of the Securities Exchange Act of 1933, 15 U.S.C. § 77q, 48 Stat. 84

Fraudulent Interstate Transactions

Sec. 17. (a) It shall be unlawful for any person in the offer or* sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly-

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which

* The words "offer or" were added by Public No. 577, 83d Cong.

would operate as a fraud or deceit upon the purchaser.

SECTION 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t, 48 Stat. 899

Liabilities of Controlling Persons

Section 20. (a) Every person who, directly or indirectly, controls any person liable under any provision of this title or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) It shall be unlawful for any person, directly or imdirectly, to do any act or thing which it would be unlawful for such person to do under the provision of this title or any rule or regulation thereunder through or by means of any other person.

(c) It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this title or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information.

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SECTION 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc, 48 Stat. 903

Validity of contracts

Section 29

(b) Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this tithe, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer

sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

RULE 10a-1 and RULE 10a-2 promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934

SHORT SALES

Rule 10a-1. Short Sales

(a) No person shall, for his own account or for the account of any other person, effect on a national securities exchange a short sale of any security (1) below the price at which the last sale thereof, regular way, was effected on such exchange, or (2) at such price unless such price is above the next preceding different price at which a sale of such security, regular way, was effected on such exchange. In determining the price at which a short sale may be effected after a security goes ex-dividend, ex-rights, or ex-any other distribution, all sale prices prior to the "ex" date may be reduced by the value of such distribution.

(b) No member of a national securities exchange shall, by the use of any facility of such exchange, execute any sell order unless such order is marked either "long" or "short."

(c) No member of a national securities exchange shall mark a sell order "long" unless (1) the security to be delivered after sale is carried in the account for which the sale is to be effected, or (2) such member is informed that the seller owns the security ordered to be sold and, as soon as is possible without undue inconvenience or expense, will deliver the security owned to the account for which the sale is to be effected.

(d) The provisions of paragraph (a) hereof shall not apply to-

(1) Any sale by any person, for an account in which he has an interest, if such person owns the security sold and intends to deliver such security as soon as is possible without undue inconvenience or expense;

(2) Any member in respect of a sale, for an account in which he has an interest, pursuant to an order to sell which is marked "long";

(3) Any sale of an odd-lot;

(4) Any sale by an odd-lot dealer to offset odd-lot orders of customers;

(5) Any sale by an odd-lot dealer to liquidate a long position which is less than a round lot, provided such sale does not change the position of such odd-lot dealer by more than the unit of trading;

(6) Any sale of a security on a national securities exchange effected with the approval of such exchange which is necessary to equalize the price of such security thereon with the current price of

such security on another securities exchange which is the principal exchange market for such security;

(7) Any sale of a security for a special arbitrage by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offset, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all holders of any class of securities of the issuer;

(8) Any sale of a security on a national securities exchange effected for a special international arbitrage account for the bona fide purpose of profiting from a current difference between the price of such security on a securities market not within or subject to the jurisdiction of the United States and on such national securities exchange; provided the seller at the time of such sale knows or, by virtue of information currently received, has reasonable grounds to believe that an offer enabling him to cover such sale is then available to him in such foreign securities market and intends to accept such immediately; or

(9) Any sale of a security on a national securities exchange effected in accordance with a special offering plan declared effective by the Commission pursuant to paragraph (d) of Rule 10b-2. For the purpose of Claus (8) hereof a depositary receipt for a security shall be deemed to be the same security as the security represented by such receipt.

RULE 10a-2. Requirements for Covering Purchases

(a) No member of a national securities exchange shall lend, or arrange for the loan of any security for delivery to the broker for the purchaser after sale or shall fail to deliver a security on the date delivery is due, if such member knows or has reasonable grounds to believe that the sale was effected, or will be effected, pursuant to an order marked "long", unless such member knows, or has been informed by the seller,

(1) that the security sold has been forwarded to the account for which the sale was effected; or

(2) that the seller owns the security sold, that it is then impractible to deliver to such account the security owned and that he will deliver such security to such account as soon as possible without undue inconvenience or expense.

(b) The provisions of paragraph (a) hereof shall not apply (1) to the lending of a securityby a member through the medium of a loan to another member, or

(2) to any loan, or arrange ment for a loan, of any security, or to any failure to deliver any security if, prior to such loan, arrangement, or failure to deliver, the exchange upon which the sale requiring the delivery of such security was effected finds (i) that such sale resulted from a mistake made in good faith, (ii) that due diligence was used to ascertain that the circumstances specified in clause (1) of Rule 10a-1(c) existed or to obtain the information specified in clause (2) thereof, and (iii) either that the condition of the market at the time the mistake was discovered was such that undue hardship would result from covering the transaction by a "purchase for cash", or that the mistake was made by the seller's broker and the sale was at a price permissible for a short sale under Rule 10a-1 (a).

RULE 10b-5 promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934

Rule 10b-5 Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

REGULATION T
(12 CFR 220)

Re: Section 2203(g)
Simultaneous long and short positions in same margin account where short position is taken first.

The Board has been asked whether the last sentence of section 220.3(g) of Regulation T applies when a customer first sells a registered security short in an undermargined account, then subsequently purchases the same security, instructing the broker to maintain long and short positions in that security.

The last sentence of section 220.3(g) prohibits the concurrent carrying of long and short position in the same registered security for the purposes of Regulation T, regardless of which position is taken first. This resultes because the word "sale" is equivalent, where the sense of the regulation requires it, to "sale position." Accordingly where a security is

purchased "long" in a margin account, and there is an existing short position in the same security in the account, the two positions must be "netted out" for purposes of the regulation.
1961 BULLETIN 156; 12 CFR 220.116.

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U. S. SECURITIES AND EXCHANGE COMMISSION RELEASES UNDER SECURITIES EXCHANGE ACT OF 1934 AND INVESTMENT ADVISERS ACT OF 1940

Release No. 1571 - February 5, 1938
Securities Exchange Act of 1934
RELATIVE TO S.E.C. PROMULGATED RULES 10a-1 and 10a-2 RELATIVE TO SHORT SELLING
An excerpt from Page 2;

"Within the meaning of the rules a person "owns" securities only to the extent that he has a net long position in such securities. Thus, if a person maintains two accounts and is short 1000 shares of a security in one and long 1000 shares of the same security in another, any sales of such security bysuch person are "short sales" and are subject to the provisions of the rules.

Rule 345 of the New York Stock Exchange:
(a) No member or member organization shall

(1) permit any person to perform regularly the duties customarily performed by a registered representative, unless such person shall have been registered and is a acceptable to the Exchange
(See CCH New York Stock Exchange Guide ¶ 2345)

Rule 401 of the New York Stock Exchange:
Every member, allied member and member organization shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs
(See CCH New York Stock Exchange Guide ¶ 2401)

Rule 405 of the New York Stock Exchange:
Every member organization is required through a general partner or an officer who is a holder of voting stock to

(1) Use diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.

(2) Supervise diligently all accounts handled by registered representatives of the organization.

(See CCH New York Stock Exchange Guide ¶ 2405)

Pertinent sections of;

Rule 431 of the New York Stock Exchange
(emphasis added)
Maintenance margin rule
(b) The margin which must be maintained in margin accounts of customers, whether members, allied members, member organization or non-members shall be as follows:
(1) 25% of the market value of all securities "long" in the account; plus
(3) $5.00 per share or 30% of the market value, in cash whichever amount is greater, of each stock "short" in the account selling at $5.00 per share or above; plus
(d) (1) Substantial additional margin must be required in all cases where the securities carried are subject to unusually rapid or violent changes in value.
(See CCH New York Stock Exchange Guide ¶2405)

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Supreme Court of the United States

October Term, 1973

No. 73-276

NORMAN A. LANDRY
Petitioner

v.

HEMPHILL NOYES & CO., ET ALS
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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CHOATE, HALL & STEWART

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OPINIONS BELOW

There were no District Court opinions, reported or unreported. The opinion of the Court of Appeals for the First Circuit (App. A to Petition) is reported at 473 F.2d 365.

QUESTIONS PRESENTED

1. Is there any conflict between the Court of Appeals decision in this case and either that of the Seventh Circuit in *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (410 F.2d 135) or that of the Second Circuit in *U.S.* v. *Peltz* (433 F.2d 48)?

2. Was petitioner denied due process of law or equal protection of the laws because of the delay, expenses and other problems he encountered in prosecuting this action?

3. May an at least partially successful civil litigant obtain Constitutional relief on the basis of his dissatisfaction with the performance of his retained attorneys?

4. Does petitioner or the record in this case raise any generally significant questions of Federal law?

STATEMENT

This is a civil action brought by a dissatisfied customer of the brokerage house of Hemphill, Noyes & Co. against that house, the manager of its Worcester office (Walter Winchester) and a former registered representative in that office (Philip J. Murphy). It is based on the handling of the account of plaintiff (now petitioner) with that office during the years 1962-4.

As set forth in the complaint upon which the action was tried,[1] (A. 67-73),[2] plaintiff made essentially two claims, first, that his account had been excessively traded or

---

[1] Actually this was the "Second Amended Complaint" (A. 67). It was filed and allowed in June, 1968 (A. 8).

[2] Record references in this brief are as follows: A. — Appendix of pleadings, etc.; Tr. — Trial transcript; Ex. — Exhibits as contained in separate bound volumes; Pet. — the instant petition for certiorari.

"churned" and second, that he had been extended excessive credit in violation of Regulation T of the Federal Reserve Board. Defendant's answer included a counterclaim for a debit balance of just under $10,000 left when plaintiff's account was closed out in June, 1964 (A. 78-9).

Following extensive discovery and motion practice, there was a ten day jury trial in February, 1971. During this period, plaintiff was represented by three different law firms (A. 4, 7, 9, 13). The case was tried by his third set of counsel.

The evidence adduced at trial may be briefly summarized as follows:

The plaintiff-petitioner lives in Holden, Massachusetts, is a high school graduate and served in World War II (Tr. 51-2). Since 1946 he has been in the insulating, painting and carpentry contracting business with his father and a brother-in-law (Tr. 184, 188-90). He made his first stock market transaction in 1953 (Tr. 53, 190-1) and was active in the market for the next three years (Tr. 54-6, 808-25, Ex. CC). He traded on margin and made one short sale (Tr. 198-201, 815-6). From 1956 to 1962, he continued to trade but less actively (Tr. 59-62, 208-220, 838, Exs. A, B, H, I).

In mid-1962, he commenced doing business with the individual defendant Murphy at the Hemphill Noyes Worcester office. Mr. Murphy handled the Landry account through August, 1963 (Tr. 109, 901). During the period July, 1962 to August, 1963, there were a total of 77 transactions in the account (Exs. 4-G through 5-0, 11A & B). Commencing in March, 1963, there were a number of short sales and subsequent purchases of the same stocks (Exs. 5-D through 5-0, 11A & B). The principal securities involved were Xerox, Chrysler and Control Data (Ibid).

As the market was generally rising, selling short resulted in losses (Tr. 917-8, 408). In August, 1963, Mr. Landry asked to have his account shifted to Ernest Anger, another registered representative in the Worcester office and a prior social acquaintance of his (Tr. 110, 328-9, 1005-6). Mr. Anger handled the account until late January or early February, 1964 (Tr. 332, 1012-5). During this five-months period there were some 32 transactions in the account (Tr. 332-3, Exs. 5P through 6B, 11B and C). These included further short sales. (Ibid).

Following further losses and an unanswered written demand for additional margin, the account was liquidated in May, 1964 (Tr. 133-5, Ex. 6I and J, 11C, 19). This liquidation left a debit balance of $9,989.58 (Ex. 6I, Tr. 340).

Throughout the entire period, Mr. Landry had regularly been receiving confirmations of each transaction and monthly statements (Tr. 255-6, 270-2). (Copies of the statements are Exs. 1 through 6 and A and B. Copies of the confirmations for 1962-4 are Exs. 8-10). Except on one occasion when Mr. Murphy sold the wrong securities, Mr. Landry made no complaints to anyone regarding the handling of his account until May, 1964 (Tr. 268-70, 276, 913-5).

The amount of credit a brokerage house may extend to a margin customer was and is controlled by Regulation T of the Federal Reserve Board.[3] Following the close-out of the Landry account, it was discovered that serious errors had been made by the margin clerk handling the account (Tr. 733-7). At trial, the expert witnesses for both sides

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[3] 12 CFR §220. The actual percentage margin a customer must put up is controlled by §8 of the Regulation (12 CFR §220.8) which is amended from time to time. During the 1962-4 period, a customer had to post a 50% and later a 70% margin (Tr. 409, 489, 742).

were in substantial agreement that there had in fact been overextensions of credit on 14 transactions on 9 different dates (see Tr. 739). 11 of these transactions were totally on overextended credit. 3 involved only partial overextensions (Tr. 740-8).

Two witnesses testified to the losses sustained by Mr. Landry on the transactions made on overextended credit. Petitioner-plaintiff's expert gave a total figure of $56,280.42 (Tr. 590). Defendants' expert reached a total of $41,162.00 (Tr. 755).

At the conclusion of the trial, the Court in effect directed verdicts for Hemphill, Noyes on its counterclaim and for the individual defendants Winchester and Murphy on the claim based on overextension of credit (Tr. 1106) and the remainder of the case was submitted to the jury together with special interrogatories under F.R. Civ. P., Rule 49(b) (Tr. 1154-6. A. 241).

The jury returned verdicts as follows: on the churning claim — $5,000 against Hemphill, Noyes, $1,000 against Winchester and $500 against Murphy (A. 239-41. Tr. 1161-2); on the claim for overextension of credit — $51,280.42 against Hemphill, Noyes (A. 241. Tr. 1163). The defendants thereafter successfully filed motions for judgment n.o.v. on the churning claims (A. 243-8, 251-3). As amended, but including interest, the judgment against Hemphill, Noyes totalled $65,040.63 (A. 251).

Petitioner appealed and his trial counsel declined to represent him on appeal (A. 250e). Hemphill, Noyes responded with a cross-appeal (A. 254-6). The Court of Appeals affirmed and subsequently denied petitioner's application for a re-hearing. The instant petition followed.

ARGUMENT

I.

THERE IS NO CONFLICT BETWEEN CIRCUITS

Petitioner, a layman appearing pro se, asserts that the decision of the First Circuit in his case is in conflict with both *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir. 1969) cert. den. 396 U.S. 838 and *U.S.* v. *Peltz*, 433 F.2d 48 (2nd Cir. 1970), cert. den. 401 U.S. 955 (Pet. 55-78(a)). Each is discussed briefly below.

Buttrey was an action by the trustee in bankruptcy of a small broker-dealer firm against the nationwide house of Merrill Lynch. The trustee claimed that Merrill Lynch allowed the financially irresponsible president of the bankrupt firm to use its facilities to speculate with customers' funds and failed to properly supervise bankrupt's account. In reversing a summary judgment for the defendants, the Seventh Circuit held that a violation of the "know your customer" provision of New York Stock Exchange Rule 405 may under some circumstances be civilly actionable. See 410 F.2d at 141-3.

Petitioner's attempt to relate the instant case to *Buttrey* is rambling and consists in large part of attempts to reargue the evidence and to reassert a motion to amend which was denied in 1970 (Pet. 55-73). However, it would appear that what he is contending is that the courts below should have recognized that his evidence showed violations by Hemphill Noyes of New York Stock Exchange Rules 345, 401, 405 and 431 (See Pet. 63-72).

Even if the evidence supported petitioner's claims that these rules were violated, the fact remains that the case was tried and considered by the courts below on two entirely different theories of liability, namely, churning and

losses resulting from violations of Regulation T. Neither of these was present in *Buttrey*. Moreover, in contrast to Buttrey's specific reliance on Rule 405, the Landry trial complaint (A. 67-73) mentions only one New York Stock Exchange Rule, Number 431 which is a margin rule (quoted at Pet. 70). Nor is there any reference to, or consideration of, stock exchange rules in the First Circuit opinion.

Accordingly, petitioner is trying to create a conflict with *Buttrey* by asserting a theory which is outside the pleadings and which was not ruled upon by the Court of Appeals. Nor is there any substantial factual similarity between this case and *Buttrey*.

Peltz was a criminal prosecution of a lawyer for conspiracy to defraud the United States by dishonestly obtaining advance information from a Securities and Exchange Commission employee and for violations of the Securities and Exchange Act of 1934 and its attendant rules by false statements to brokers as to stock ownership while placing sell orders.

There is no obvious resemblance or connection between *Peltz* and the instant case but petitioner attempts to erect a bridge by asserting that Peltz's conviction was based upon his misrepresentations to his brokers that he was selling "long" when in fact he was selling "short" (Pet. 74). He then asserts that essentially similar misrepresentations were made in the confirmations and statements sent him by Hemphill Noyes (Pet. 74-8).

The factual analogy between willful criminal misstatements by a customer and apparent bookkeeping mistakes in monthly statements is farfetched at best. More important, it is clear that the First Circuit opinion never reaches the issues discussed in *Peltz* and considered Hemphill Noyes' "erroneous bookkeeping" only in connection with the mea-

sure of damages for Regulation T violations. See 473 F.2d at pp. 372-3.

There is thus little, if any, significant factual or legal overlap between this decision and *Buttrey* or *Peltz* and certainly nothing resembling a clear conflict between the Circuits on any point of law, large or small.

II.

THERE IS NOTHING TO PETITIONER'S CLAIMS THAT HE WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

Petitioner claims that "THERE IS EVIDENCE THAT THERE WAS A CONSPIRACY TO DENY PETITIONER A JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF HIS ACTION (OBSTRUCTION OF JUSTICE) WHICH DENIED PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT" (Pet. 71).

His argument on this point is most kindly described as hard to follow and would seem to amount to a general contention that everyone involved in the litigation, including the District Court and his own counsel, were out to do him in.

To the extent that specific points can be identified, petitioner attempts under this head to reargue certain evidentiary rulings, especially with respect to the measure of damages (Pet. 79-84). Not only were these rulings affirmed by the Court of Appeals but it borders on the ridiculous to suggest that, even if erroneous, such rulings in a civil case would amount to a violation of Constitutional rights.

Petitioner further claims that he was denied a "speedy" trial (Pet. 79. See also Pet. 22-8). There are several obvious answers to any arguments based on the fact that this action was not tried until about seven years after it was filed. First, there is no showing that the defendants moved for continuances or were otherwise responsible for delay. Second, petitioner shows absolutely no loss of witnesses or other prejudice from the delay. And third, it is transparent from the record that the major cause was petitioner's difficulties with his various counsel and his apparent problems between 1968 and 1970 in obtaining new counsel.[4] However, these difficulties were his own and cannot be laid at the door of either defendants or the District Court or otherwise form the basis for appellate relief.

Finally, petitioner laments at length regarding various actions or inactions of his several attorneys, including the post-trial efforts of his trial counsel to collect their fees (Pet. 83-7. See also Pet. 21-9, 32-4). See in particular his contention that he "was subjected to psychological violence from the Court and his attorneys" (Pet. 83). Whatever may be the situation in criminal cases involving assigned

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[4] The docket entries show that the plaintiff was at various times represented in the District Court by three different firms.

The action was originally filed in June, 1964 by Verne L. Vance, Esq. of Foley, Hoag & Eliot (A.4). On October 10, 1966, this firm was allowed to withdraw (A.7).

A month later, Monroe Inker, Esq. of Crane, Inker & Oteri then entered an appearance for plaintiff (A.7). Mr. Inker and his firm were in turn granted leave to withdraw on January 11, 1968 (A.7).

The plaintiff then appeared pro se until James G. Reardon, Esq. of Hartwell, Driscoll, Reardon & Driscoll entered an appearance on March 25, 1970 (A.9). On November 20, 1970, Mr. Reardon and his partner Mr. Keenan also attempted to withdraw (A.11) but their motion was denied and the case was in fact tried for plaintiff by Mr. Keenan. Messrs. Keenan and Reardon subsequently declined to represent plaintiff on appeal (A.250e).

counsel, defendants know of no instance wherein a civil plaintiff's dissatisfaction with his own retained attorneys has been the basis for Constitutional relief. Defendants further somewhat ruefully note that, far from losing their client's case, petitioner's trial counsel recovered a judgment for some $65,000.00.

III.

PETITIONER RAISES NO GENERALLY SIGNIFICANT QUESTION OF FEDERAL LAW

With respect to at least four of the issues he attempts to raise, petitioner "submits that its public importance is obvious and that it was wrongly decided below" (Pet. 61, 73, 74, 78). No doubt these issues are both emotionally and financially important to petitioner personally. The test is, however, the importance of the issues "to the public as distinguished from" importance to the parties involved. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79.

Applying this test to the present case, it may first be noted that this is a strictly private dispute between one customer and one stockbroker with two of the latter's employees as additional defendants. There are no class allegations and no suggestion that the interests of anyone other than the immediate parties are involved.

Second, stockbroker-customer disputes have been well known to the Courts for at least a century and neither of the basic claims set forth in the amended complaint (churning and over-extensions of credit) represents any new development or innovative theory of law. See generally

Note, Churning By Securities Dealers, 80 Harv. L. Rev. 869 (1967); Note, Federal Margin Requirements as a Basis for Civil Liability, 66 Colum. L. Rev. 1462 (1966).

Third, this case was in large part decided on its own particular facts after a ten day jury trial. More specifically, three of the major issues presented by petitioner to the Court of Appeals were dismissal of the individual defendants, judgment n.o.v. on the churning claims and the refusal of the District Court to submit a separate claim form for fraudulent practices. See 473 F.2d at pp. 373-4. Each of these turned on deficiencies in petitioner's proof in this particular case and thus seems essentially unique to the present litigation and certainly of no general significance.

IV.

AS TO PETITIONER'S APPEAL THE COURT OF APPEALS DECISION WAS CLEARLY RIGHT

The portion of the Court of Appeals opinion which deals directly with the points raised by petitioner appears at 473 F.2d 372-4. A brief examination of those pages shows one quite obvious application of §28(a) of the Securities Exchange Act (15 U.S.C. §78bb(a)) in affirming what amounted to a directed verdict on defendant Hemphill Noyes' counterclaim and thereby preventing a double recovery, an almost equally clear application of the "netting-out" principles of Regulation T to the measure of damages for violations of that regulation and holdings that on three points petitioner's proof was insufficient to create jury questions.

None of these issues is legally particularly com
difficult and it is submitted that on each the Court
peals was clearly right.[5]

CONCLUSION

For the foregoing reasons, this petition for a writ
tiorari should be denied.

Respectfully submitted,

JAMES C. HEIGHAM
Attorney for Respon

Of counsel
JEFFREY L. HEIDT
CHOATE, HALL & STEWART

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[5] The appeal did present one novel and probably quite
question, namely, the measure of damages where there h
only a partial overextension of credit. See 473 F.2d at
370-1. However, this was raised exclusively by defenda
decided against them and they have not petitioned or ce
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WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

Norman A. Landry
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Regulation T, Section 220.4(f)(6) . 23

Federal Rules Civil Procedure

Rule 1 33
Rule 15(b) 9

Rules of New York Stock Exchange

Rule 345 14,27
Rule 405 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

OPINIONS BELOW

There were no District Court opinions, reported or unreported. The opinion of the Court of Appeals for the First Circuit (App. A to Petition) is reported at 43 F.2d 365.

REPLY TO RESPONDENTS STATEMENT

Respondents state on Page 2, the last paragraph,
"As set forth in the complaint upon which the action was tried, (A. 67-73)*, plaintiff (now petitioner) made essentially two claims, first that his account had been excessively traded or "churned" and second, that he had been extended excessive credit in violation of Regulation T of the Federal Reserve Board".

Facts - The above statement is in gross error. The case was tried by implied consent of the parties on the theory of liability for fraudulent and deceitful practices perpetrated by the defendants upon the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (See Page 9 to 26 of this Brief).

Respondents state on Page 3, the last paragraph,
"Commencing in March,1963, there were a number of short sales and subsequent purchases of the same stocks (Exs. 5-d

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* Record references in this brief are as follows:
A.- Appendix of pleadings, etc.
Tr.- Trial Transcript
Pl. Ex.- Plaintiff's Exhibits as contained in separate bound volumes
Pet.- The instant petition for certiorari

through 5-0, 11-A & B). The principle securities involved were Xerox, Chrysler and Control Data (Ibid).

Facts - Plaintiff testified (Tr. 348), that a short sale has to be made in the short account.

Defendant Murphy testified (Tr. 974), that the number four account was the short account.

There was only one short sale of Xerox that was effected in plaintiff's #4 short account (Pl. Ex. 5-D and Pl. Ex. 11-A, Item 43).

There was only one short sale of Chrysler that was effected in plaintiff's #4 short account (Pl. Ex. 5-H and Pl. Ex. 11-B, Item 76).

There were three short sales of Control Data that were effected in plaintiff's account (Pl. Ex. 5-F & H and Pl. Ex. 11-B, Item 62, 72, 74).

Respondents state on Page 4, the first paragraph, (emphasis added), "As the market was generally rising, selling short resulted in losses (Tr. 917-8, 408). In August, 1963, Mr. Landry asked to have his account shifted to Ernest Anger, another registered representative in the Worcester office and a prior acquaintance of his (Tr. 110, 328-9, 1005-6).

Mr. Anger handled the account until late January or early February, 1964 (Tr. 332, 1012-5). During this five months period there were some 32 transactions in the account (Tr. 332-3, Exs. 5P through 6B, 11B and C). These included further short sales. (Ibid).

Facts - There were no short sales that were effected in plaintiff's #4 short account during that period (Pl. Ex. 5-Q, 5-S, 5-U, 5-W, 6-B and Pl. Ex. 11-B & C).

Respondents state on Page 4, paragraph 2,
"Following further losses and an unanswered written demand for additional margin, the account was liquidated in May,1964 (Tr. 133-5, Ex. 6I and J, 11C,19)".

Facts - The respondents fail to state what occured prior to the liquidation.
Plaintiff testified (Tr. 339-340), that he made a complaint to defendant brokerage firm on May 18th, through a letter of complaint. Defendant Murphy testified (Tr. 978) that he received the complaint.
Plaintiff testified that he received a telegram May 21st demanding $37,000 (Tr. 133 to 135 & Pl. Ex. 19)

Said telegram indicates that Hemphill, Noyes & Co. allowed plaintiff's account to go $37,000 below New York Stock Exchange margin requirements.

Respondents state on Page 4, last paragraph (last sentence), (emphasis added), "Following the close-out of the Landry account, it was discovered that serious errors had been made by the margin clerk handling the account (Tr. 733-7).

Facts - Plaintiff testified (Tr. 135 & Pl. Ex. 19), that his entire account was liquidated on May 25, 1964.
Almost ten months later, on Mar. 5, 1965 (A. 5), an affidavit of Herman H. Kuver, a member of the partnership of Hemphill, Noyes & Co., was filed with the U.S. District Court. Said affidavit states (emphasis added), "At all times prior to the close of business on January 19, 1964, the accounts of the plaintiff and transactions thereon were more than adequately margined in accordance with the requirements of the rules of the New York Stock Exchange and Regulation T of the Board of Governors of the Federal Reserve Bank, with an excess of such margin available for future transactions of $37,688 at

the close of business on January 19, 1964". (emphasis added) (A. 156)

Mr. Joseph Shwartz, from the U.S. Securities and Exchange Commission, testified (Tr. 506), that on Nov. 21, 1963 there was a deficiency in plaintiff's account of $93,001.02, and on Dec. 31, 1963 a deficiency of $43,103.53 (Tr. 479), and that on Jan. 24, 1964 a margin deficiency of $47,818.98 (Tr. 480).

Defendant Winchester testified (Tr. 691, 858 to 860) that it was in January 24, 1964 when it was first brought to his attention that plaintiff's account was undermargin.

This would be 5 months before the account was liquidated (Pl. Ex. 19).

Defendant Winchester testified (Tr. 862) (emphasis added), that even though he knew that plaintiff's account was under margin, a purchase was made in plaintiff's account in April.

Defendant Winchester testified (Tr. 624), each salesman has to know his customer, and each salesman, every margin account we have, we have a pretty fair idea of how the account stands (emphasis added).

RESPONDENTS STATE:

I. THAT THERE IS NO CONFLICT BETWEEN THE FIRST AND SEVENTH CIRCUIT

An excerpt from Respondents Brief, Page 6 and Page 7, is as follows, "--- the case was tried and considered by the courts below on two entirely different theories of liability, namely, churning and losses resulting from violations of Regulation T".

Facts - The above statement made by the Respondents is in error because the case was tried by implied consent of the parties on the theory of liability for fraudulent and deceitful practices perpetrated by the defendants upon the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. (F.R. Civ. P., 15(b)) (A. 226-7).

On March 2, 1971, the fourth day into the trial, Plaintiff's Trial Brief (A. 215 to 227) was filed with the District Court (A. 14).

On March 3, 1971 the Plaintiff's Trial Brief was discussed (Tr. 464). The District Court stated (Tr. 464), "---order that evidence henceforth be limited to the

transactions set forth in this trial brief, and you will be guided accordingly from this point out". (See also Tr. 652 and A. 226)

As is indicated in the Appendix which was before the Court of Appeals and transmitted to this Court, on Page 226-7 of said Appendix, indicates that the theory of liability was in regards to fraudulent and deceitful practices in violation of Section 10(b) of the Securities Exchange Act of 1934 and that under Section 29(b) of the Securities Exchange Act of 1934 states, in essence, that every contract made in violation of any provision of that title or of any rule or regulation thereunder, shall be void and implies that damages and rescission may be recovered.

Plaintiff's Trial Brief was discussed by the District Court (Tr. 464, 553-4, 650-1-2 to 673).

Petitioner's case was tried by implied consent of the parties on the theory of liability with respect to certain fraudulent practices committed by the defendants in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

As can be seen in the following pages, there was a preponderance of evidence which supports plaintiff's allegations.

Some of the charges made in Plaintiff's Trial Brief are as follows (A. 215 to 227);

Fraudulent and deceitful activities in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, such as,

(a) When defendant Murphy first took over plaintiff's account, he was not a registered representative.

(b) This fact was never announced to the plaintiff.

(c) When the defendant company over extended credit to the plaintiff, and in each case where there was an over extension, the defendants failed to notify the plaintiff and failed to liquidate his account.

(d) Defendants effecting certain securities transactions as "long" sales when it was required that they be effected as "short" sales.

(e) Defendants "churning" plaintiff's account.

(f) Hemphill, Noyes & Co. violating Rule 10a-1(c) promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934, Section 10, by executing transactions in the margin account of plaintiff as "long" sales when they were not carried in the plaintiff's account and Hemphill, Noyes & Co.

were not informed that petitioner owned the securities so sold.

(g) Defendant Hemphill, Noyes violated Regulation T, Section 220.3(g) by failing to "net out" plaintiff's position when he was holding a "long" and "short" position simultaneously in the same security.

(h) Violations of Section 7 of the Securities Exchange Act and provisions of Regulation T as a result of over extending credit in plaintiff's account.

(i) Defendant company allowed plaintiff's account to go $37,000 below New York Stock Exchange margin requirements.

The evidence, at the trial, substantiated all of the charges made in Plaintiff's Trial Brief (A. 215 to 227).

The District Court and attorneys discussed the subject matter in regards to 10(b) claim (Tr. 1049-1050-1051-1052-1053-1054,1061-1062). Petitioner's attorney outlined to the District Court the evidence in regards to the fraudulent misrepresentations.

The District Court refused to submit to the jury (Tr. 1054) a separate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against plaintiff prohibited by Section 10(b). (Tr. 1049-1050).

This matter is now before this Court.

The evidence indicates that the case was tried by implied consent of the parties to the issues contained in plaintiff's amended complaint (A. 139 to 150) which was filed on Nov. 8, 1968 and denied on Oct. 8, 1970 (A. 9-10).

The evidence, at the trial, supports the allegations contained in plaintiff's amended complaint which was denied (A. 139 to 150).

The denial of plaintiff's amended complaint which was filed on Nov. 8, 1968 and denied on Oct. 8, 1970 was before the Court of Appeals who rejected petitioner's issue without discussion.

This matter is now before this Court (Pet. 15, Question 20).

As can be seen below the case was tried by implied consent of the parties and the evidence supports plaintiff's amended complaint which was denied.

> As indicated in Petitioner's Petition (Pet. 58 to 60), defendants admitted, at the trial, that defendant Hemphill, Noyes and defendant Walter Winchester permitted and assisted defendant Philip J. Murphy to effect securities transactions in plaintiff's account and to receive commissions on said transactions when defendant Murphy was not a registered representative.

Plaintiff testified (Tr. 84), that defendant Murphy never indicated to him that he wasn't a registered representative.

The District Court (Tr. 1063) refused to instruct the jury, on plaintiff's requested instruction (A. 237, No.//), in regards to the Rule of the New York Stock Exchange applicable to plaintiff's action and to the trial evidence, which is Rule 345 of the New York Stock Exchange, which states, (a) No member or member organization shall (1) permit any person to perform the duties customarily performed by a registered representative unless such person shall have been registered and is acceptable to the Exchange.

A timely objection was made, at the trial, to the District Court's ruling (Tr. 1158).

The Court of Appeals rejected plaintiff's issue without discussion (Appendix to Pet. 102).

The matter is now before this Court.

There is another violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, by defendants misrepresenting to the plaintiff by forwarding to the plaintiff monthly statements which showed certain sales to be "long" sales when, in fact, they were required to be effected as "short" sales (A. 225).

Plaintiff testified (Tr. 375, 104), that according to the monthly statement (Pl. Ex. 5-I), that on June 19, 1963 there was a long sale of 100 shares of Xerox in margin account.

Defendant Murphy testified (Tr. 979 to 982), that he executed said transaction as a long sale in plaintiff's margin account (emphasis added).

Mr. Joseph Shwartz, from the U.S. Securities and Exchange Commission, testified (Tr. 455) that the transaction of June 19, 1963 should have been treated as a short sale (emphasis added).

The transaction on June 19, 1963 is settlement date (Tr. 687) and June 13, 1963 is trade date.

Plaintiff's Exhibit 43 (Tr. 767), (emphasis added), was reoffered by the defendants, was marked in evidence, and stipulated to by the defendants (Tr. 760). Plaintiff's Exhibit 43 indicates that the transaction of 100 shares of Xerox described above, actually, had been effected as a "long" sale and should have been, as required, effected as a "short" sale.

There is a further violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 when the defendant company over extended credit to the plaintiff on 16 separate occasions and in each case where there was an over extension, the defendants failed to notify the plaintiff and failed to liquidate his account.

The testimony and the evidence, at the trial, (Tr. 172, 176-177, 366, 375-376), indicates clearly that defendant Hemphill, Noyes violated Regulation T, Section 220.3(g) because of their failure to net out the plaintiff's position when he was simultaneously holding a "long" and "short" position in the same security (A. 218-9).

Plaintiff showed (Tr. 172) to the Court and jury, the loss of 4,667.11 which appears on plaintiff's monthly statement, Plaintiff's Exhibit 5-Pl.

Plaintiff (Tr. 376) showed to the Court and jury the figure of 4,667.11 which appeared in the LOSS column of Plaintiff's Chalk Exhibit 11-B.

Plaintiff testified (Tr. 375), that the Plaintiff's Chalk Exhibit (Pl. Ex. 11-A, B & C) was an exact replica of how the transactions were effected as shown on the monthly statements (Pl. Ex. 4-A through 6-M) and that the losses (Tr. 368) that appeared in the LOSS column of Plaintiff's Chalk Exhibit were reflected on plaintiff's monthly statements, and that the monthly statements and Plaintiff's Chalk Exhibits showed that when there was held simultaneously a "long" and "short" position in the same security, defendant Hemphill, Noyes failed to net out the two positions.

Plaintiff testified (Tr. 142), that on 14 occasions his account was simultaneously long and short the same security.

Defendants counsel admitted that there was a failure to net out (Tr. 394) (emphasis added).

The District Court stated, "They didn't net out in fact" (Tr. 395) (emphasis added).

Plaintiff testified (Tr. 149), that the monthly statements indicated that there was a loss of approximately $96,000.

Plaintiff's Chalk Exhibit 11-C, the last column of said Exhibit, was a column entitled, LOSS, which indicated a total loss of 96,196.33.

There was an offer of proof (Tr. 582, 588-589) made on behalf of the plaintiff, that Mr. Thomas Staiti, Certified Public Accountant (Tr. 511), would have testified in regards to the three accounts* of plaintiff and plaintiff's Exhibit 42 was marked for Identification.

Plaintiff's Exhibit 42 which was marked for Identification, indicates, among other matters, a figure in the column marked, Losses, an amount of 96,196.33.

The defendants (Tr. 368) objected to the LOSS columns on Plaintiff's

* cash account, margin account, short account (TR. 514)

Chalk Exhibit (Pl. Ex. 11-A, B & C) and the District Court ordered (Tr. 721-722) the LOSS column of Plaintiff's Chalk Exhibit be removed and marked for Identification.

This was one of the issues raised by plaintiff-petitioner before the Court of Appeals and is now before this Court (Pet. 11, Question 7).

Prior to petitioner's oral argument before the Court of Appeals, petitioner observed that one of the LOSS columns which had been marked for Identification, had been tampered with, as someone had neatly cut off a section from the bottom of Pl. Ex. 11-B which had been marked for Identification, which contained the figure of 4,667.11, and said cut off section was missing.

Petitioner informed the Court of Appeals in his opening statement and again in his Petition for Rehearing (Pet. 106-7), of the above matter, and informed the Court of Appeals to refer to Plaintiff's Exhibit 11-B, the LOSS column marked for Identification which was filed with Plaintiff's Appendix and contains the complete LOSS column as it was originally.

Hemphill, Noyes & Co. violated Rule 10a-1(c) promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 as a result of Hemphill, Noyes & Co. executing transactions in plaintiff's account as "long" sales when the security to be delivered were not carried in plaintiff's account and Hemphill, Noyes & Co. were not informed that plaintiff owned the securities that were sold (A. 225).

There was an Exhibit in evidence, and stipulated to by the defendants (Pl. Ex. 43) which indicates that Hemphill, Noyes & Co. were effecting securities transactions in plaintiff's account as "long" sales when the plaintiff did not own the securities so sold which resulted in violation of SEC Rule 10a-1(c) described above.

There was a sale of Xerox Corp. with a Trade Date of June 13, 1963 and Settlement Date of June 19, 1963.

A long sale is when you have a stock in your account and you own it and you sell it and a a short sale is a sale of a security that you don't own (Tr. 31).

Defendant Murphy testified (Tr. 979 to 982), that he executed the Xerox transaction with a settment date of June 19, 1963 as a long sale in plaintiff's margin account.

Mr. Joseph Shwartz, from the U.S. Securities and Exchange Commission testified (Tr. 455), that said transaction should have been treated as a short sale.

There was a stipulation to Plaintiff's Exhibit 43 (Tr. 757 to 760) and defendants (Tr. 769) reoffered Plaintiff's Exhibit 43 and it was marked in evidence.

Plaintiff's Exhibit 43 that was in evidence, indicates that said transaction, actually, it had been effected as a "long" sale and should have been, as required, effected as a "short" sale.

The District Court (Tr. 1062), refused to instruct the jury, on rules applicable to trial evidence, on plaintiff's requested instruction (A. 236, No. 9) that,
A "long sale" account according to the Securities Exchange Act, rule 10a-1 and rule 10a-2 is a sale of a security one owns.

A timely objection was made, at the trial, to the District Court's ruling (Tr. 1158).

The Court of Appeals rejected petitioner's issue without discussion (Appendix to Pet. 102).

Defendant Murphy testified (Tr. 963-964), in regards to "know your-customer rule", which is known as Rule 405 of the New York Stock Exchange.

Defendant Winchester testified (Tr. 624) in regards to know your customer.

Issues were raised in the District Court by implied consent.

The District Court refused petitioner's request to submit to the jury a separate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against petitioner prohibited by Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

The Court of Appeals affirmed the action of the District Court (Pet. 102).

There was a preponderance of evidence that the records maintained by defendant Hemphill, Noyes of plaintiff's Special Miscellaneous Account under Section 4(f) (6) of Regulation T issued by the Board of Governors of the Federal Reserve System were kept on a woefully haphazard, repeatedly inaccurate, and inconsistent basis in violation of Regulation T (12 CFR 220), Section 220.4(a) (2).

Mr. Thomas J. Lanigan, defendants witness, (Tr. 727) that S.M.A. stands for Special Miscellaneous Account.

Defendants attorney stated (Tr. 406), to the Court and jury that Exhibit O is a reproduction of the original SMA maintained at the time.

The Court (Tr. 475) informed the jury that the handwritten account, so called, is the account as it was maintained at the New York office by a man who made computations and wrote in figures on this S.M.A. account and it was the one in existance at the time of these violations.

Mr. Joseph Shwartz, from the SEC,

testified (Tr. 506) that Exhibit O had obvious errors in it.

Defendants conceded (Tr. 466) that Exhibit O the handwritten SMA contains a number of inaccuracies.

Defendants witness, Mr. Thomas J. Lanigan, testified (Tr. 733-4), that there were serious errors in SMA on June 13th.

Defendant Murphy's testimony indicates in 1964 in reply to a question, when asked whether or not he made inquiries about plaintiff's affairs, Murphy replied, "I didn't have to make any inquiries" and in answer to a question, "Did you ever ask him what his financial position was?" and Mr. Murphy replied, "I assumed it was good." and also that Mr. Murphy didn't have any idea of how much money Mr. Landry could lose in the market (Tr. 964).

There was uncontroverted testimony by the plaintiff, that from January of 1962 to the end of May 1964 the total transactions amounted to one million two hundred thousand or one million two hundred and ten thousand (Tr. 146).

Defendant Winchester testified (Tr. 695,716) that Hemphill, Noyes received some $7,000 in commissions. Plaintiff testified (Tr. 150) that approximately $7,000 in commissions were paid.

Defendant Murphy testified (Tr. 942-3), that March 22, 1963 Market Tides letter, he was co-author of that one and in that letter defendant Murphy recommended the sale of long positions in Chrysler, and to take profits and defendant Murphy was shown plaintiff's Exhibit 29-D and defendant Murphy admitted that it was an investment letter dated March 22, 1963 that was published by Hemphill, Noyes & Company in regards to Chrysler which stated, "Over the next several years, the capital gains potential for Chrysler could be the greatest in the industry, and on this basis, I would still regard the stock as a distincly attractive speculation".

> One of the issues that was before the Court of Appeals was that, "The District Court Made A Prejudicial Error And Abused Its Discretion By Denying, On October 8, 1970, "Motion For Leave To File Amended Complaint" Which Was Filed On November 8, 1968".
>
> The Court of Appeals rejected petitioner's issue without discussion (Pet. 102).
>
> This matter is now before this Court (Pet. 15, Question 20).
>
> Petitioner should have been allowed to amend his complaint to conform with the evidence.

Respondents Brief on Page 7 (an excerpt) states,
"Nor is there any substantial factual similarity between this case an Buttrey".

The Respondents are in error, as is indicated below.

The decision of the Court of Appeals for the First Circuit, in this case, is in direct conflict with the decision of the Court of Appeals fro the Seventh Circuit on the same matter as indicated by the case of Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 410 F.2d 135 (7th Cir. 1969) cert. den. 396 U.S. 838.

In that case the Court of Appeals stated (emphasis added), that the touchstone for determining whether or not a violation of a particular rule is actionable should properly depend upon its design "for the direct protection of investors".

Here one of the functions of Rule 345 is to protect the public, so that permitting a private action for its violation is entirely consistent with the purposes of the statutes.

The evidence, at the trial, showed that the defendants had a callous disregard of Rule 345 and its purpose to protect the public. Such a breach of fair practice undermines the protection of investors and surely plays an integral part in SEC regulation of Exchange members.

The defendants actions carries with it the gravest danger of engendering in the public a loss of confidence in the Exchange and its members, a kind of damage which can significantly impair fulfillment of the Exchange's function in our economy.

Rule 345 imposes an explicit duty unknown to the common law.

The Court of Appeals in the Buttrey case found that a violation of a rule of the New York Stock Exchange is actionable under the Securities Act and Rule

10b-5 of the Securities Exchange Act when a particular rule depends upon its design "for the direct protection of investors.

RESPONDENTS STATE:

II. THAT THERE IS NO CONFLICT BETWEEN THE FIRST AND SECOND CIRCUIT

An excerpt from Respondents Brief, Page 7 (4th paragraph);

"There is no obvious resemblance or connection between Peltz and the instant case---"

The above statement made by the Respondents is in error, for reasons stated below.

In the case of U.S. v. Peltz, 433 F.2d 48 (2nd Cir., 1970), cert. den. 401 U.S. 955, Peltz was convicted on Four Counts of an indictment.

Count One charged Peltz with a conspiracy.

Counts Three and Four charged willful violations of § 10(b) of the Securities Exchange Act of 1934 and SEC's Rule 10b-5 in that Peltz had told two brokerage houses that sales of stock which he had ordered sold were long whereas they were short.

Count Five charged that Peltz willfully violated § 10(a), relating to short sales, and the Commission Rule 10a-1. (See 433 F.2d 49)

Defendant Murphy testified (Tr. 979 to 982) (emphasis added), that a long sale does not require margin and that a short sale requires margin. Defendant Murphy testified that he executed the transaction of one hundred shares of Xerox with a settlement date of June 19, 1963 as a long sale in plaintiff's number two margin account and that by executing said transaction as a long sale, the margin requirements was avoided. (Tr. 982)

Mr. Joseph Shwartz, from the United States Securities and Exchange Commission testified (Tr. 454-455), (emphasis added), that the transaction of June 19, 1963 of one hundred shares of Xerox that was effected in plaintiff's margin account, for purposes of Regulation T, should have been treated as a short sale requiring margin.

The transaction on June 19, 1963 is settlement date (Tr. 687) and June 13, 1963 is trade date.

Plaintiff's Exhibit 43 (Tr. 767), (emphasis added), was reoffered by the defendants, was marked in evidence, and stipulated to by the defendants. Plaintiff's Exhibit 43 indicates that the transaction of one hundred shares of Xerox described above, actually, had been effected as a "long" sale and should have been, as required, effected as a short sale.

Plaintiff testified (Tr. 104), that plaintiff's monthly statement, Plaintiff's Exhibit 5-I indicates that on June 19, 1963 there was a sale of a hundred shares of Xerox Corporation in plaintiff's type two margin account. Plaintiff testified (Tr. 375) that this was a long sale in margin account.

Type four account (Tr. 73) is the short account.

Defendant Murphy testified (Tr. 982), he was effecting securities transactions as long sales in order to avoid margin requirements.

As can be seen by the above and preceeding page, the monthly statements accurately reflect the manner in which securities transactions were effected in plaintiff's account by defendant Murphy and that there was no bookkeeping mistakes in monthly statements as purported in Respondents Brief on Page 7.

Defendant Winchester testified (Tr. 639), that he was in charge and had the responsibility for all of the men in his office and that (Tr. 866) he was aware of what was going on there. Defendant Winchester testified (Tr. 640), that everybody in his office were under his control and supervision at all times. Defendant Winchester testified (Tr. 713), that he was familiar with each confirmation slip that was sent out during the period 1962 to 1964. Defendant Winchester

testified (Tr. 635), that he examined plaintiff's monthly statement each month during the perion 1962 to 1964. Defendant Winchester testified (Tr. 634-640), that he was familiar with Regulation T and the terms long and short during the period 1962 to 1964.

Petitioner's Petition on Page 77 states that the evidence indicates that on 14 occasions the defendant brokerage firm effected securities transactions as long sales when the defendant brokerage firm should have effected these transactions as short sales.

As previously described, in the Peltz case, Peltz was convicted on Four Counts of an indictment. On Counts Three and Four, Peltz was found guilty of misrepresenting that his sales of stock were long when, in fact, they were short. The Court in that case said that the misrepresentations constituted violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

By analogy the defendants in this case misrepresented to the petitioner, and therefore violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by forwarding to the petitioner monthly statements which showed certain securities transactions being effected as "long" sales when in fact by SEC Rules, defendants should have executed these transactions as "short" sales.

RESPONDENTS STATE:

III. THAT THERE IS NOTHING TO PETITIONER'S CLAIMS THAT HE WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

The Petitioner had 24 issues before the Court of Appeals. The first issue was, "DID THE PLAINTIFF RECEIVE A JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF HIS ACTION?"

Petitioner cited Rule 1 of the Rules of Civil Procedure for the United States District Courts.

Petitioner would never make a statement to the Supreme Court or to any Court that there was a conspiracy to deny petitioner a just, speedy and inexpensive determination of his action (Obstruction of justice), unless the petitioner had overwhelming evidence to substantiate the claim.

Petitioner will take this opportunity to reply to statements made on Page 9 of Respondents Brief in regards to petitioner's counsels.

The action was originally filed in June, 1964 by Lewis H. Weinstein, Esq. and Verne W. Vance, Jr., Esq. (A. 4). On Feb. 7, 1966 petitioner signed an agreement with the law firm. Petitioner had paid the law firm $6,000. A paragraph of the agreement states, "Attorneys will continue to represent Client and to prosecute the suit on Client's

same day, Garrity, D.J. allowed the withdrawal.

Petitioner engaged another attorney (A. 7) and paid this attorney $3,500. Subsequently, the attorney notified petitioner that they were going to withdraw. Petitioner objected to their withdrawal and a hearing was held (A. 7).

Petitioner informed the Court that he objected to the withdrawal and that he had already expended $9,500 in attorneys fees. Garrity, D.J. allowed the withdrawal.

As can be seen, the petitioner never had asked any of the above attorneys to withdraw.

Petitioner was presented documents, for his signature, by both previous attorneys. Petitioner refused to sign the documents as they were sham. One of the documents is entitled, "Compendium Of Notices To Admit Facts And Answers" and was signed by defendants counsel.

Garrity, D.J. ordered plaintiff pro se to file an answer to said Compendium (A. 8), which plaintiff pro se, did file (A. 83 to 123).

Said Compendium was discussed in a number of hearings that were held prior to the trial.

Petitioner then engaged his trial counsel. Petitioner's trial attorneys filed a motion to withdraw on the last day of the trial (Tr. 1164-1165). The District Court informed petitioner's attorneys, "It is a motion for leave to withdraw, but let me say this, that I don't knowthat it is a motion that I would be inclined to pass upon at this time in any event, inasmuch as counsel have a lien in this case, etc.".

The motion (Tr. 1165) was filed with no action taken until further notice.

The following day, petitioner's trial counsels sent a letter to petitioner informing petitioner that they had a lien against judgement and interest accrued on said judgement and that the amount of their lien is one-third of the total interest plus costs (See Pet. 86).

RESPONDENTS STATE:

IV. THAT PETITIONER RAISES NO GENERALLY SIGNIFICANT QUESTIONS OF FEDERAL LAW

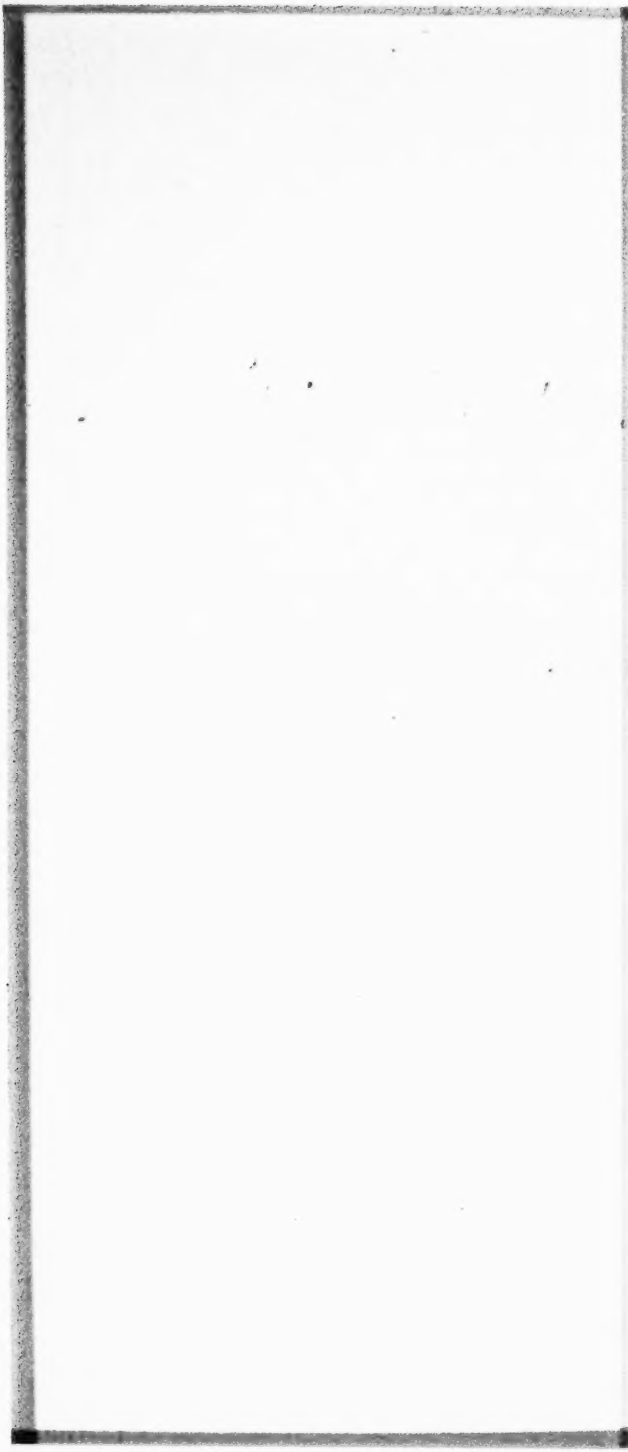
The respondents are in error, as the questions raised are not only significant but also involves the public interest.

RESPONDENTS STATE:

V. THAT AS TO PETITIONER'S APPEAL THE COURT OF APPEALS DECISION WAS CLEARLY RIGHT

The respondents are in error for reasons indicated below.

The case was tried by implied consent of the parties on the theory of liability of the anti-fraud provision of the Securities Exchange Act of 1934, Section 10(b) and Rule 10b-5 thereunder (Tr. 464, 553-4, 650 to 655)(A. 226-7) and there was a preponderance of evidence supporting the plaintiff's Trial Brief (Tr. 1047 to 1054, 1061-1062)(Pl. Ex. 43, Tr. 757 to 760) and the District Court refused petitioner's request to submit to the jury a separate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against plaintiff prohibited by Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder (Tr. 1049-50, 1054).



Plaintiff's Exhibit 11-C & 42 were marked for Identification and indicates a figure in the LOSS column of 96,196.33 (See Page 18 of this brief).

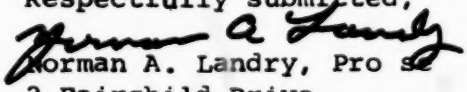
There was testimony (Tr. 150, 695, 716), that Hemphill, Noyes received some $7,000 in commissions.

An offer of proof was made (Tr. 171) in regards to rescission that it would be approximately $150,000.

CONCLUSION

For the forgoing reasons, as well as those which have been urged in the petition, certiorari should be granted.

Respectfully submitted,



Norman A. Landry, Pro se
2 Fairchild Drive
Holden, Massachusetts 01520

SUPREME COURT, U. S.
FILED
OCT 12
MICHAEL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM # 1

Norman A. Landry
2 Fairchild Drive
Holden, Massachusetts 01520

Pro se for Petitioner

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

Petitioner respectfully request this Court to grant petitioner's motion for leave to file supplemental memorandum.

Petitioner's reason for this motion is that petitioner is pro se and as a result of further research, petitioner wishes to have this material deemed a part of the petition for certiorari.

Norman A. Landry

2 Fairchild Drive

Holden, Massachusetts 01520

Pro se for Petitioner

SUPPLEMENTAL MEMORANDUM

Even though the District Court refused leave to amend the pleadings, before the trial (A. 9, 139 to 150, 212d, 10)*, there was an expressed consent of the parties for the trial of issues not raised in the pleadings (Tr. 463-4) (A. 215 to 227)(Tr. 1047 to 1059, 1061-2).

The case was tried by expressed consent of the parties on the theory of liability for fraudulent and deceitful practices perpetrated by the defendants upon the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (A. 226, 217).

Defendant Murphy testified to securities transactions that he effected in plaintiff's account and was receiving commissions on said transactions when he was not a registered representative all with the approval of defendants Winchester and Hemphill Noyes (Tr. 903-4) (Pet. 58 to 60).

---

* Record references in this memorandum are as follows:
A.- Appendix to pleadings, etc.
Tr.- Trial Transcripts filed with Appendix
Pl. Ex.- Plaintiff's Exhibits as contained in seperate bound volumes
Pet.- The instant petition for certiorari

Plaintiff testified (Tr. 84) that defendant Murphy never indicated to him that he wasn't a registered representative.

The evidence, at the trial, indicated that the transactions effected by defendant Murphy when he was not a registered representative resulted in a loss in plaintiff's account.

The monthly statement, Plaintiff's Exhibit 4-H, indicates that on Aug. 24, 1962 there was a purchase of 200 shares of Chadbourn Gotham in the amount of 1,377.50 and the monthly statement, Plaintiff's Exhibit 6-K1 indicates that on June 1, 1964 there was a sale of 200 shares of Chadbourn Gotham in the amount of 506.28 when the account was liquidated (Tr. 339).

Defendant Murphy testified (Tr. 903-4) that he made the purchase in plaintiff's account described above when he was not a registered representative and that his number (Tr. 940, 957) appears on the confirmation slips for transactions which liquidated plaintiff's account.

Plaintiff testified (Tr. 84-5-6) using monthly statement (Pl. Ex. 4-H) where defendant Murphy had made a purchase of 200 shares of Chadbourne-Gotham in plaintiff's account indicated on monthly statement as August 24, 1962.

Plaintiff testified (Tr. 90-1), using chalk (Pl. Ex. 11-A) where Chadbourne-Gotham was purchased and sold and how the loss was computed (Tr. 147).

Plaintiff's Chalk Exhibit 11-C, Item number 123, the Loss column indicated a Loss of 871.22 as a result of the transactions in Chadbourne-Gotham.

The plaintiff (Tr. 172-3, 376-7) (emphasis added) showed to the Court and the jury a monrhlt statement, Exhibit number 5-Pl, where an actual loss stemming from a transaction was shown in the amount of 4,667.11 and plaintiff indicated to the Court and jury the figure of 4,667.11 which appeared in Loss column of Plaintiff's Chalk Exhibit 11-B.

Plaintiff testified (Tr. 375) that Plaintiff's Chalk Exhibit (Pl. Ex. 11-A, B & C) was an exact replica of how the transactions were effected in the monthly statements (Pl. Ex. 4-A through 6-M) and that the losses (Tr. 368) that appeared in the Loss column of Plaintiff's Chalk Exhibit were reflected on plaintiff's monthly statement.

The plaintiff testified (Tr. 149), that the monthly statements indicated a loss of approximately $96,000.

Plaintiff's Chalk Exhibit 11-C, the last column of said Exhibit, was a column entitled, Loss, which indicated a total loss of 96,196.33.

Plaintiff's witness, Mr. Thomas J. Staiti, Certified Public Accountant (Tr. 511) was prevented (Tr. 520) from testifying to total losses sustained by the plaintiff in his account and there was an offer of proof (Tr. 582, 588-9) made on behalf of the plaintiff, that Mr. Staiti would have testified to in regards to loss in plaintiff's account and Plaintiff's Exhibit 42 was marked for Identification.

Plaintiff's Exhibit 42 which was marked for Identification, indicates, among other matters, a figure in the column marked, Losses, an amount of $96,196.33.

The defendants (Tr. 720-1), objected to the Loss column on Plaintiff's Chalk Exhibit 11-A, 11-B, and 11-C and the District Court (Tr. 721-2) ordered said Loss column be removed and marked for Identification. This matter is now before this Court (Pet. 11, Question 7).

Someone had tampered with Pl. Ex. 11-B, the Loss column which had been marked for Identification, as someone had neatly cut off a section from the bottom of Pl. Ex. 11-B which had been marked for Identification, which contained the figure of 4,667.11 (See Petitioner's Reply Brief, Page 19).

The District Court (Tr. 1049-1050, 1054), refused to submit to the jury a seperate claim form or seperate claim with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against the plaintiff prohibited by Section 10(b). This matter is now before this Court (Pet.72-3).

The Court of Aopeals was in error (Pet. 101-2) when it stated that plaintiff made only one complaint in April, 1963.

Plaintiff testified (Tr. 257, 265, 360), that he complained about two weeks after he got out of the hospital in June or July of 1963 and again through a letter of complaint on May 18, 1964 (Tr. 339-340) (A. 179).

There was a preponderance of evidence that plaintiff's account was churned by the defendants for no justifiable reason other than to profit the defendants.

Defendant Winchester testified (Tr. 601-2), that from 1957 to 1962 there were five to six transactions in plaintiff's account.

There was uncontroverted testimony by the plaintiff (Tr. 146) that from January of 1962 to the end of May 1964 the total transactions amounted to one million two hundred thousand or one million two hundred and ten thousand.

Defendant Murphy was effecting secu-

and receiving commissions when defendant Murphy was not a registered representative, with the approval of defendant Winchester & defendant Hemphill, Noyes & Co. (Pet. 58-59-60).

Transactions effected in plaintiff's account, by defendant Murphy when defendant Murphy was not a registered representative, resulted in losses in plaintiff's account. (See Page 2 and 3 of this memorandum)

As a result of defendant Murphy effecting transactions in plaintiff's account when he was not a registered representative, resulted in defendants violating Rules of New York Stock Exchange, violating Agreement on all confirmation slips (Tr. 713) and violating Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

There was testimony, at the trial, by Mr. Joseph Shwartz, from the United States Securities and Exchange Commission of numerous over extentions of credit by the defendant Hemphill, Noyes & Co. to plaintiff.

Securities transactions would not have taken place in plaintiff's account had the defendants scrupulously observed the Federal securities laws and New York Stock Exchange Rules.

Plaintiff testified (Tr. 146) that he had never been simultaneously long and short in his account prior to meeting Mr. Murphy.

Plaintiff testified, that defendant Murphy stated to him that the reason why he would make a purchase of the same security in plaintiff's account, that plaintiff was short in, was to protect the plaintiff's account (Tr. 267, 113, 129, 346). Plaintiff testified (Tr. 267) that this was beyond him and that (Tr. 131) the account was so complex and he didn't understand it, and (Tr. 141) that he really didn't comprehend it, but accepted what Murphy told him, because plaintiff was not familiar with how those things worked out.

Plaintiff testified (Tr. 266-7) that there was a short sale of Chrysler in plaintiff's account and that defendant Murphy informed the plaintiff that he had purchased Chrysler in plaintiff's account, that it was necessary to protect plaintiff's account, which made plaintiff's account long and short in Chrysler and that Murphy sold Chrysler the day after he bought it because Murphy stated Chrysler started to turn down and that it didn't require an uptick, plaintiff testified that this was beyond him at the time. Defendant Murphy purchased Chrysler for $13,466.38 and sold it the following day for $12,995.35.

Plaintiff testified (Tr. 104) that he had no conversation with Murphy prior to these transactions, plaintiff was in the hospital.

Petitioner testified (Tr. 367-8), under cross examination, that the sale of Chrysler was handled like a regular long sale and should have been a short sale, which required margin, and that the deposit was not made and it was executed improperly because a short sale requires what is called an uptick and the broker has got to mark the slip that he turns in that goes to New York either as a long sale or a short sale. It is a violation if he marks a sale long---(Defendants attorney interupted plaintiff before he could finish the sentence).

Mr. Joseph Shwartz, from the United States Securities and Exchange Commission testified (Tr. 458-9), that the violation in Chrysler came when the broker treated the transaction as a long sale when the broker should have treated it as a short sale.

The manner in which the defendants were effecting securities transactions in plaintiff's account was in violation of the Securities and Exchange Commission Rule 10a-1 and also the defendants perpetrated a fraud on the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (For Rule 10a-1 see Pet. 134-5) (See also U.S. v. Peltz, 433 F.2d 48 (2nd Cir.,1970), cert. den. 401 U.S. 955)

Plaintiff testified (Tr. 135, 339-340) that after a letter of complaint was sent out to defendant brokerage firm, defendant brokerage firm liquidated plaintiff's entire account and plaintiff received nothing. Defendant Murphy testified that he received the complaint (Tr. 978)(A. 279).

Plaintiff testified (Tr. 141) that some of the securities that he brought in to defendant Murphy in Nov. 1962 (Tr. 89-90) plaintiff had owned for five to six years (Pl. Ex. 4-Ml) and that the securities that he didn't bring in, plaintiff still has these securities.

Plaintiff testified (Tr. 57, 136), that after defendant Hemphill, Noyes & Co. liquidated his account, plaintiff immediately made an in depth study of all of the rules and regulations and went to the New York Stock Exchange and to the Securities and Exchange Commission.

In the case of Hecht v. Harris, Upham & Co. 283 F.Supp. 419, the Court stated, "Churning cannot be established by precise rule or formula, and essential question of fact for determination is whether volume and frequency of transactions, considered in light of nature of account and situation and needs and objectives of customer, have been so excessive as to indicate purpose of broker to derive profit for himself while disregarding interest of customer".

In the case of Hecht v. Harris, Upham & Co., C.A.Cal. 1970, 430 F.2d 1202 (9th Cir. 1970), the Court stated, "Where a single fraudulent scheme based on excessive churning of customer's account involved both securitiea and commodities, court was entitled to award damages for entire loss".

The District Court (Tr. 1061) refused to instruct the jury on plaintiff's requested instructions in regards to churning (Pet. 42-3), which instructions would have had the effect of making defendants liable jointly and severally to the same extent (A. 217) and said instructions would have been in conformity with Section 20(a) of the Securities Exchange Act of 1934 (Pet. 132).

The District Court stated (Tr. 1061) that said instructions talk in terms of really a directed verdict.

The District Court should have rendered a directed verdict or after the trial entered a judgement notwithstanding the verdict for plaintiff (Pet. 16(a), Question 26) for commissions and damages as a result of defendants willful flagrant violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

The plaintiff's brief to the Court of Appeals, requested the Court to order the District Court to enter a judgement notwithstanding the verdict in favor of the plaintiff.

In the case of Hecht v. Harris, Upham & Co. 283 F.Supp. 420 the Court stated, "Evidence in action by customer against brokerage firm and its commodities manager for damages for alleged violations of Securities Acts established that defendant firm did not maintain reasonably adequate system of internal supervision and control, that it did not enforce with any reasonable diligence such system as it did maintain, and that brokerage firm did not act in good faith but, on the contrary, indirectly induced, participated in, approved and accepted benefits of excessive trading of plaintiff's account by firm's commodities manager. Securities Exchange Act of 1934 § 20(a), 15 U.S.C.A. § 78t(a)".

The jury found by a preponderance of evidence that the defendants were guilty of churning plaintiff's account. The District Court granted defendants motion for judgement notwithstanding the verdict not because the account was not churned in violation of the Federal securities laws but because the Court (A 250d) had reservations as to whether the defendants should be held liable jointly and severally for the amount of $6,500. (Pet. 14, Question 19)

As a RESULT of the District Court order (TR. 1142) Mr Stahl testified to Losses (TR. 577-578) That do not appear on the Monthly Statements) (See also TR. 522-523) mal

On the last day of the trial, plaintiff's trial attorneys filed a motion to withdraw and the District Court stated that inasmuch as counsel have a lien in this case, the motion was filed until further notice (Tr. 1165).

The following day, plaintiff's trial counsel sent a letter to plaintiff informing plaintiff that they had a lien against the judgement and that they would not file for a new trial or take an appeal on behalf of the plaintiff.

Although the District Court did not allow plaintiff's trial attorneys to withdraw, plaintiff's trial attorneys refused to represent plaintiff during the critical ten day period following the trial. The District Court was informed of this matter.

Nobody informed plaintiff of his rights.

This Court has not yet acted upon my Petition for a Writ of Certiorari. NAL

Respectfully submitted,

Norman A. Landry
2 Fairchild Drive
Holden, Massachusetts 01520

SUPREME COURT, U. S.

FILED

OCT 25 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF
AND
SUPPLEMENTAL BRIEF

Norman A. Landry
2 Fairchild Drive
Holden, Massachusetts 01520

Pro se for Petitioner

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Petitioner respectfully request this Court to grant petitioner's motion for leave to file supplemental brief.

Petitioner's reason for this motion is that petitioner is pro se and through further research has uncovered material which is extremely vital for the just determination of petitioner's petition as said supplemental brief indicates the errors of facts and law of the court below and petitioner wishes to have this material deemed a part of the petition for certiorari.

This Court has not yet acted upon my petition for a writ of certiorari.

Respectfully submitted,

Norman A. Landry
2 Fairchild Drive
Holden, Massachusetts 01520

Pro se for Petitioner

SUPPLEMENTAL BRIEF

Petitioner wishes to supplement his petition for writ of certiorari by adding the following under the heading:
QUESTIONS PRESENTED

28. Whether or not it was proper for the Court of Appeals to deny appellant-petitioner's request that an order be issued directing the District Court to enter a judgement notwithstanding the verdict in favor of appellant-petitioner in regards to the churning claim.

Petitioner wishes to supplement his petition for writ of certiorari, under the heading, "Reasons for Granting the Writ" by adding the following under the heading:
THERE IS EVIDENCE THAT THERE WAS A CONSPIRACY TO DENY PETITIONER A JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF HIS ACTION (OBSTRUCTION OF JUSTICE) WHICH DENIED PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT

Plaintiff-Petitioner's complaint alleged that the defendants violated Section 10(b) of the Securities Exchange Act of 1934 by engaging in

excessive trading in plaintiff-petitioner's account (Churning)(A. 69-70)* (Tr. 16-7-8) which resulted in huge trading losses to plaintiff-petitioner for which he was obliged to pay huge commissions to defendants.

Plaintiff-Petitioner's complaint states (A. 72-3)(Tr. 21)(An excerpt)(Emphasis added):

"Wherefore plaintiff demands:
(1) That plaintiff have judgement against defendants jointly and severally, in the sum of one hundred thousand two hundred seventy-nine dollars ($100,279) and such other amounts as the Court shall determine, plus interest, and;
(2) that plaintiff have judgement against the defendants for costs, including reasonable attorneys fees".

Plaintiff-Petitioner's, "Trial Brief", states (A. 216), "PLAINTIFF IS ENTITLED TO RELIEF FOR THE CHURNING OF HIS ACCOUNT".

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* Record references in this supplemental brief are as follows:
A.- Appendix to pleadings, etc. before the Court of Appeals and transmitted to this Court.
Tr.- Trial transcript before the Court of Appeals and transmitted to this Court - Bound in two (2) seperate volumes.
Pl. Ex.-Plaintiff's Exhibits before the Court of Appeals and transmitted to this Court.
Pet.- Petition for writ of certiorari filed with this Court

An excerpt from said, "Trial Brief", (A. 217)(emphasis added):

"In the case before the Court the brokers that handled plaintiff's account were employed by the defendant company. The plaintiff submits that a brokerage house which employs and controls a broker who violates the Exchange Act is liable jointly and severally with and to the same extent as the broker, etc."

Plaintiff-Petitioner's requested instructions were filed with the District Court (Tr. 1060)(A. 14) and request number 4, 5 and 6 states the following (A. 236):

4. The churning of the plaintiff's account by the defendant, Hemphill Noyes & Co. resulted in a loss to the plaintiff of all the commissions paid by the plaintiff to the defendant corporation.

5. The churning of the plaintiff's account by the defendant, Philip J. Murphy, resulted in a loss to the plaintiff of all the commissions paid to defendant Hemphill Noyes.

6. The churning of the plaintiff's account by the defendant, Walter Winchester, resulted in a loss to the plaintiff of all the commissions paid by the plaintiff to Hemphill Noyes.

The above requested instructions would have made the defendants liable jointly and severally to the same extent in conformity to Section 20(a) of the Securities Exchange Act of 1934 (Appendix E to Pet., Page 132).

The District Court stated in regards to petitioner's requested instructions (Tr. 1061)(emphasis added):

"4, 5 and 6 I will not give. They talk in terms of really a directed verdict".

A timely objection was made, at the trial (Tr. 1158), to the denial of the requested instructions which included among them, number 4, 5 and 6.

The jury found by a preponderance of evidence, that defendants were guilty of churning plaintiff-petitioner's account and found $5,000 against defendant Hemphill, Noyes & Co., $1,000 against defendant Winchester and $500 against defendant Murphy (Tr. 1162-3) (A. 14, 239-241).

On the last day of the trial, petitioner's trial attorneys filed a motion to withdraw and the District Court (Tr. 1164-5) stated that inasmuch as counsel have a lien in this case, the Court took no action and filed the motion until further notice.

The day following the trial, Mar. 11, 1971, plaintiff-petitioner's trial attorneys sent a letter to plaintiff-petitioner which states as follows:

"This office will not file either a motion for a new trial or take an appeal on your behalf. This letter is also notice to you that we have a lien for services on the total amount of the judgement and interest accrued on said judgement. The amount of our lien is one-third of the total interest plus cost".

Plaintiff-Petitioner sent a copy of this letter to District Judge Garrity on Mar. 19, 1971.

A copy of this letter is attached to a motion which petitioner filed with the Court of Appeals on June 14, 1971 and said letter is designated as Exhibit CR-2. The records have been transmitted to this Court.

On March 19, 1971, plaintiff-petitioner sent a letter to District Judge Garrity which states:

"I want to call your attention to the copy of the enclosed letter that I have received from my counsel.
Although you declined to permit them to withdraw from the case, they refused to represent me during the critical ten day period following judgement".

"As you know, I am not satisfied with the judgement or with the materials which went to the jury, I have attempted to retain other counsel but I have been informed that without a transcript it would be impossible to have counsel unfamiliar with the case to effectively vindicate my rights in the ten day period allowed by the Rules. I have asked counsel whom I have consulted to write a letter to you on this matter".

A copy of this letter is attached to a motion which petitioner filed with the Court of Appeals on June 14, 1971 and said letter is designated as Exhibit CR-1. The records have been transmitted to this Court.

A letter was sent to District Judge Garrity, on March 22, 1971, which letter states, in essence (in part) that the court, in these circumstances can be expected to do what it can to protect plaintiff's rights and the letter cites a case where judgement n.o.v. was entered for a party whose counsel had sought a directed verdict at trial but did not file a j.n.o.v. motion after entry of judgement. This letter has been transmited to this Court.

On April 20, 1971, (A. 15) a hearing was held in District Court in regards to defendants motion for judgement notwithstanding the verdict on plaintiff's churning claim.

Plaintiff-Petitioner's trial attorneys

* FIRST SAFE DEPOSIT NAT'L BANK V. WESTERN UNION TEL. Co. 337 F.2d 743 (1ST CIR. 1964) mal

never filed any written response to defendants motion, even though plaintiff-petitioner had requested (by letter) that they do so.

At said hearing there was no Court Stenographer present. (In plaintiff's case there had been a pretrial hearing where the Court Stenographer transcribed the conversations and subsequently, plaintiff-petitioner would be informed by the Court Stenographer that she had no notes, which required that plaintiff-petitioner file with the District Court a record of the proceedings (A. 212a, 212g, 16a) - One day during the trial, the plaintiff-petitioner had employed a girl to take down some notes of the testimony (Tr. 717-9) and the District Court ordered that she turn said notes over to the court. Plaintiff-Petitioner never got the notes back).

At said hearing in regards to the churning issue, plaintiff-petitioner took down notes of the conversation and they have become part of the record (A. 16a, 250a-250e).

As indicated by the record (A. 250d), the District Court had reservations as to whether the liability of the $6,500 on the churning claim should be jointly or severally.

The day following the hearing, the District Court (A. 15) allowed defendants motion for judgement notwithstanding the verdict on churning claim and dismissed the charges of churning claim against all of the defendants (A. 251-2-3).

On April 21, 1971, the plaintiff-petitioner sent a letter to District Judge Garrity which informed the Judge that plaintiff's trial attorneys have refused to order the trial transcripts and requested the District Judge to direct the Official Court Reporter to give plaintiff the transcripts. The District Judge did not order the transcripts for the plaintiff.

A copy of this letter is attached to a motion which petitioner filed with the Court of Appeals on June 14, 1971 and said letter is designated as Exhibit CR-3. The records have been transmitted to this Court.

Petitioner filed an appeal, pro se, with the Court of Appeals (A. 254-5) and subsequently filed a brief and in said brief, petitioner discussed the churning issue on Page 75-78 and in Reply Brief on Page 12-15 and petitioner informed the Court of Appeals of Section 20(a) of the Securities Exchange Act of 1934. Said briefs have been transmitted to this Court.

Petitioner's brief which was filed with the Court of Appeals, discusses churning on Page 100 and the Conclusion on Page 101 requested the Court of Appeals to order the District Court to enter judgement notwithstanding the verdict in favor of plaintiff-petitioner.

The Court of Appeals rejected petitioner's request and upheld the actions of the District Court.

Appellant-Petitioner filed a petition for rehearing with the Court of Appeals (Appendix C to Pet., Page 106) and in said petition, appellant-petitioner again referred the Court of Appeals (Pet. 121-2) to Section 20(a) of the Securities Exchange Act of 1934.

In the case of Hecht v. Harris, Upham & Co., C.A.Cal. 1970, 430 F.2d 1202 (9th Cir. 1970), the Court stated, "Where a single fraudulent scheme based on excessive churning of customer's account involve both securities and commodities, court was entitled to award damages for entire loss".

In the Hecht v. Harris, Upham & Co., 283 F.Supp. 418-9, the Court stated, "Churning" involves bad faith, fraudulent purpose of securities broker to derive profit for himself by disregarding interest of his customer is "manipulative device or contrivance" within Securities Act and is "device to defraud" and practice and course of business which operates as or would operate as fraud and deception within Securities Exchange Commission Rule proscribing engaging in practice or course of business which operates as or would operate as fraud on any person in connection with purchase or sale of securities. Securities Exchange Act of 1934, Section 10(b), 15 U.S.C.A. § 78j(b)."

The District Court denied (Tr. 1061) plaintiff-petitioner's request for a directed verdict on churning issue.

The District Court refused to instruct the jury on plaintiff-petitioner's requested instructions on churning issue which would have had the effect of making the defendants liable jointly and severally to the same extent in conformity with Section 20(a) of the Securities Exchange Act of 1934. A timely objection was made, at the trial, to the District Court's ruling (Tr. 1158).

The District Court erred in not directing a directed verdict in favor of plaintiff-petitioner on the churning issue.

The jury by a preponderance of evidence found the defendants guilty of churning plaintiff-petitioner's account.

Although the District Court did not allow petitioner's trial attorneys to withdraw, petitioner's attorneys refused to represent petitioner during the critical ten day period following judgement and therefore the petitioner had nobody to vindicate his rights.

The District Court was informed of this matter.

The District Court was informed of a case where judgement notwithstanding the verdict was entered for a party whose counsel sought

a directed verdict at trial but did not file judgement notwithstanding the verdict motion after entry of judgement. Letter transmitted to this Court.

The District Court erred in not entering judgement notwithstanding the verdict in favor of plaintiff-petitioner.

The petitioner requested the Court of Appeals to direct an entry of judgement notwithstanding the verdict on churning claim (Brief before the Court of Appeals, transmitted to this Court, Page 100-1) which resulted in defendants willfully violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and that the defendants be hel jointly and severally to the same extent for damages which includes payment of commissions and trading losses.

THE DISTRICT COURT SHOULD HAVE GRANTED PETITIONER'S REQUEST FOR A DIRECTED VERDICT ON CHURNING CLAIM. THE JURY FOUND BY A PREPONDERANCE OF EVIDENCE THAT THE DEFENDANTS WERE GUILTY OF CHURNING PETITIONER'S ACCOUNT AND THE DISTRICT COURT SHOULD HAVE ENTERED JUDGEMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF-PETITIONER'S BEHALF AND THE COURT OF APPEALS ERRED IN NOT GRANTING PETITIONER'S REQUEST FOR A JUDGEMENT NOTWITHSTANDING THE VERDICT BECAUSE AS A MATTER OF LAW, THE DEFENDANTS ARE LIABLE JOINTLY AND SEVERALLY TO THE SAME EXTENT FOR CHURNING PETITIONER'S ACCOUNT (SECTION 20(a) OF THE SECURITIES EXCHANGE ACT OF 1934 - See Pet. 132).

The Court of Appeals in their opinion is in error as to the facts and law.

The Court of Appeals, in regards to the Churning claim state (Pet., Appendix A, Page 100)(An excerpt)(Emphasis added);

"It was uncontroverted that Landry received confirmation slips and monthly statements from Hemphill, Noyes setting forth the full details of every transaction entered, and that with one minor exception relating to a mistaken transaction in April 1963, he at no time registered any complaints with the defendants concerning the manner in which his account was being handled"

Facts - The confirmation slips has language to the effect that transactions are subject to the rules of the New York Stock Exchange and the broker agrees to comply with the Rules of the New York Stock Exchange (Tr. 713).

Defendant Murphy testified (Tr. 903-4) to securities transactions that he effected in plaintiff's account when he was not a registered representative, all with the approval of defendant Winchester (Tr. 700).

Plaintiff testified (Tr. 84) that defendant Murphy never indicated to plaintiff that Murphy wasn't a registered representative.

Therefore, the defendants never gave the full details of every transaction

as the defendants never informed the plaintiff that they were willfully flagrantly violating Rules of the New York Stock Exchange. This acted as a fraud upon the plaintiff which resulted in defendants violation the Federal securities laws (anti-fraud provisions)

The confirmation slips and monthly statements showed certain securities transactions that were being effected by the defendants as long sales and Mr. Joseph Shwartz, from the United States Securities and Exchange Commission, testified (Tr. 459) that this was a violation as the defendants should have effected and treated said transactions as short sales.

Therefore, the defendants never gave the full details of every transaction, as the defendants never informed the plaintiff that the defendants were violating the Federal securities laws and Rules promulgated thereunder, as a result of defendants effecting securities transactions as long sales when defendants should have been effecting said transactions as short sales.

The defendants were effecting securities transactions in plaintiff's account and over extending credit in plaintiff's account and the defendants never informed plaintiff that defendants were extending credit to the plaintiff in excess of the limits permitted by the Federal securities laws.

Therefore, the defendants never gave the full details of every transaction entered.

Numerous other examples can be cited, but it is clear that the defendants never gave the full details of every transaction entered.

Plaintiff testified (Tr. 257, 265, 360), that he complained about two weeks after he got out of the hospital in June or July of 1963 and again through a letter of complaint on May 18, 1964 (Tr. 339-340)(A. 179). Defendant Murphy testified that plaintiff complained in May 1964 (Tr. 978, 985).

Therefore, the Court of Appeals, in their opinion, was in error when they stated that there was only one complaint that was made by the plaintiff.

The Court of Appeals (Pet., Appendix A, on the bottom of Page 101) indicates some sort of rule or formula to determine churning.

In the case of Hecht v. Harris, Upham & Co. 283 F.Supp. 419 the Court stated:

"Churning cannot be established by precise rule or formula, and essential question of fact for determination is whether volume and frequency of transactions, considered in light of account and situation and needs and objectives of customer, have been so excessive as to indicate purpose of broker to derive profit for himself while disregarding interest of customer".

The Court of Appeals state, in their opinion (Pet., Appendix A, Page 102) (An excerpt):

"Instead, the jury was merely presented with the raw data concerning plaintiff's transactions, and then asked to conclude that the trading in his account had been "excessive".

Facts - There was a preponderance of evidence that the defendants operated in bad faith.

To have allowed defendant Murphy to effect securities transactions in plaintiff's account and to receive commissions when he was not a registered representative, all with the approval of defendants Winchester and Hemphill, Noyes, all in violation of the Rules of the New York Stock Exchange, indicates crystal clear

that the defendants purpose was to derive profits for themselves while disregarding the interest of the plaintiff.

The first transaction that defendant Murphy effected in plaintiff's account was the purchase of Southern Pacific Railroad. Mr. Shwartz, from the S.E.C., testified (Tr. 411-2-3) that there was a violation of Regulation T. Defendant Murphy testified (Tr. 903-4) that he was not a registered representative when he effected this transaction in plaintiff's account.

Defendant Murphy was effecting securities transactions on margin in plaintiff's account when he was not a registered representative. Mr. Shwartz, from the S.E.C. testified (Tr. 420-1-2) that there was a violation of Regulation T as a result of the purchase of Chadbourn-Gotham in plaintiff's margin account and that there was a violation of Regulation T as a result of the purchase of Dayco Corporation in plaintiff's margin account (Tr. 424-5-6). Defendant Murphy testified (Tr. 903-4) that he effected these transactions in plaintiff's account when he was not a registered representative.

There was a preponderance of evidence by Mr. Shwartz, from the S.E.C., of numerous other transactions which resulted in violations of over extentions of credit.

Defendant Murphy would purchase a security in plaintiff's account and then would sell the same security the following day, and then defendant Murphy would inform the plaintiff that this was done to protect his account (Tr. 266-7).

Defendant Winchester testified (Tr. 862) that even though he knew that plaintiff's account was under margin, defendants made a purchase in plaintiff's account.

Plaintiff testified (Tr. 89-90), that the securities that he had owned that he hadn't given to the defendants, plaintiff still has the same securities.

Plaintiff testified (Tr. 187) that his salary had a range of fifteen to twenty five thousand during the period 1962-1964.

Defendant Winchester testified (Tr. 601-2) that from 1957 to 1962 there were five to six

transactions in plaintiff's account.

There was uncontroverted testimony by the plaintiff (Tr. 146) that from January of 1962 to the end of May 1964 the total transactions amounted to one million two hundred thousand or one million two hundred and ten thousand.

Defendant Murphy testified (Tr. 964), that he didn't make any inquiries as to plaintiff's financial position and that defendant Murphy didn't have any idea of how much money the plaintiff could lose.

Transactions would never have occured in plaintiff's account if the defendants had scrupulously observed the Federal securities laws and New York Stock Exchange Rules.

The jury found by a preponderance of evidence that the defendants were guilty of churning plaintiff's account.

The Court of Appeals should have granted petitioner's request for judgement notwithstanding the verdict to be entered in District Court in accordance with Section 20(a) of the Securities Exchange Act of 1934.

Defendant Winchester testified (Tr. 639-640) that everybody in the office were under his control and under his suprevision at all times (emphasis added).

Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t, 48 Stat. 899 states (emphasis added):

Liabilities of Controlling Persons
Section 20(a) Every person who, directly or indirectly, controls any person liable under any provision of this title or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

THE DISTRICT COURT SHOULD HAVE GRANTED PLAINTIFF-PETITIONER'S REQUEST FOR A DIRECTED VERDICT ON CHURNING CLAIM AS THERE WAS A PREPONDERANCE OF EVIDENCE THAT DEFENDANTS CHURNED THE ACCOUNT AND ACTED IN BAD FAITH AND THEREFORE WERE LIABLE JOINTLY AND SEVERALLY TO THE SAME EXTENT.

THE JURY FOUND THE DEFENDANTS GUILTY OF CHURNING PLAINTIFF-PETITIONER'S ACCOUNT BUT THE DISTRICT COURT DID NOT INSTRUCT THE JURY THAT AS A MATTER OF LAW THE DEFENDANTS WERE LIABLE JOINTLY AND SEVERALLY TO THE SAME EXTENT.

THE DISTRICT COURT SHOULD HAVE ENTERED JUDGEMENT NOTWITHSTANDING THE VERDICT ON CHURNING CLAIM IN BEHALF OF PLAINTIFF-PETITIONER.

THE COURT OF APPEALS ERRED IN NOT GRANTING APPELLANT-PETITIONER'S REQUEST THAT THE COURT OF APPEALS ORDER THE DISTRICT COURT TO ENTER JUDGEMENT NOTWITHSTANDING THE VERDICT, BECAUSE AS A MATTER OF LAW, THE DEFENDANTS WERE LIABLE JOINTLY AND SEVERALLY TO THE SAME EXTENT FOR CHURNING PLAINTIFF-PETITIONER'S ACCOUNT.

During the trial, Defendants' Exhibit R, "Margin Agreement" was placed in evidence and read to the jury (Tr. 221).

Said Exhibit R states (in part)(emphasis added), " that all transactions shall be subject to the constitution, rules, charter, by-laws and usages of the exchange or market, and its clearing house, if any, where the transactions are effected."

On July 8, 1968 (A. 8) plaintiff-petitioner filed with the District Court, "Plaintiff's Answer To Counterclaim of Defendant Hemphill, Noyes & Co.". In said Answer plaintiff stated (among other matters)(emphasis added): "Plaintiff says that the margin agreement, attached as Exhibit "A" to Defendants' Answer and Counterclaim, was violated by Hemphill, Noyes & Co. as early as August 6, 1962". The District Court, over two years later, on Sept. 28, 1970 (A. 9) at a hearing that was held, allowed defendants-respondents motion to strike plaintiff-petitioner's Answer (Transcript transmitted to this Court, Page 23-4-5). Appellant-Petitioner's Reply Brief filed with the Court of Appeals and transmitted to this Court contains the above matter on Page 9.

Plaintiff's Exhibit 8-A which was in evidence (Tr. 74) indicates that there was a purchase of Kerr McGee Oil with a trade date of August 6, 1962 and a settlement date of August 10, 1962. Plaintiff testified (Tr. 82-3) that defendant Murphy effected this transaction in plaintiff's margin account (emphasis added). Defendant Murphy testified (Tr. 903) (emphasis added) that he effected said transaction in petitioner's account when he was not a registered representative.

Petitioner states that the evidence is crystal clear that defendant Murphy effected the securities transaction on Aug. 6, 1962 when he was not a registered representative in violation of New York Stock Exchange Rules and the terms stated in the "Margin Agreement" which states (in essence) that all transactions shall be subject to the rules of the exchange. In accordance with Section 29(b) of the Securities Exchange Act of 1934 the transaction is void and that the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder shall be void (Pet. 133) (Tr. 410-411)

Mr. Joseph Shwartz, from the United States Securities and Exchange Commission, testified (Tr. 419-421) that in August 24, 1962 there was a transaction in plaintiff's margin account of 200 shares of Chadbourne-Gotham where there was a violation of Regulation T.

Defendant Murphy testified (Tr. 903-4) that he effected the transaction of 200 Chadbourne-Gotham August 24th in petitioner's account when he was not a registered representative. (emphasis added)

Plaintiff-Petitioner's trial attorneys had complete knowledge that this transaction subsequently resulted in a loss to the plaintiff and yet, plaintiff-petitioner's trial attorneys never illicited any testimony, before the jury, from Mr. Staiti or from Mr. Lanigan, as to the monetary loss of the Regulation T violation, over extention of credit, on Chadbourne-Gotham transaction.

Plaintiff testified (Tr. 90-1), using chalk (Pl. Ex. 11-A) where Chadbourne-Gotham was purchased and sold and how the loss was computed (Tr. 147) but plaintiff did not testify to the dollar amount of the loss.

There was a loss registered in plaintiff's account as a result of the transactions in Chadbourn-Gotham of $871.22, See Plaintiff's Exhibit 11-C for Identification, Item 123 and also Plaintiff's Exhibit 4-I and 6-K1 which were in evidence (Tr. 73).

The District Court erred by refusing to submit to the jury a seperate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against plaintiff prohibited by Section 10(b) (Tr. 1049-1050-1054).

The District Court erred when the District Court stated that one of the reasons why He would not submit a seperate 10(b) claim form to the jury was that (Tr. 1052)(emphasis added) there were no losses shown when defendant Murphy was effecting securities transactions in plaintiff's account when defendant Murphy was not a registered representative.

The petitioner's, "Reply Brief" which was filed with the Court of Appeals and transmitted to this Court indicates on Page 25, 30 of said brief that there was a loss of $871.22 as a result of Chadbourne-Gotham transaction which defendant Murphy effected in plaintiff's account when defendant Murphy was not a registered representative, contrary to the District Court's statement (Tr. 1052).

Plaintiff's trial attorneys, "Trial Brief" (A. 220) filed with the District Court (A. 14)(Tr. 310), alleges a violation of Regulation T and over extention of credit on Aug. 24, 1962 of Chadbourne-Gotham transaction which violation was confirmed by the testimony of Mr. Shwartz, from the S.E.C. (Tr. 419-421) and defendant Murphy testified (Tr. 903-4) that he effected said transaction in plaintiff's account when he was not a registered representative, and plaintiff's trial attorneys knew that there was a subsequent loss resulting from the transaction and yet, in said attorneys, "Request For Instructions" (A. 236) they do not claim any violation of an over extention of credit on Chadbourne-Gotham of August 24, 1962.

Defendant Murphy testified (Tr. 903-4) that he effected the transaction of 200 Chadbourne-Gotham August 24th in petitioner's account when he was not a registered representative. (emphasis added)

Plaintiff-Petitioner's trial attorneys had complete knowledge that this transaction subsequently resulted in a loss to the plaintiff and yet, plaintiff-petitioner's trial attorneys never illicited any testimony, before the jury, from Mr. Staiti or from Mr. Lanigan, as to the monetary loss of the Regulation T violation, over extention of credit, on Chadbourne-Gotham transaction.

Plaintiff testified (Tr. 90-1), using Chalk (Pl. Ex. 11-A) where Chadbourne-Gotham was purchased and sold and how the loss was computed (Tr. 147) but plaintiff did not testify to the dollar amount of the loss.

There was a loss registered in plaintiff's account as a result of the transactions in Chadbourn-Gotham of $871.22, See Plaintiff's Exhibit 11-C for Identification, Item 123 and also Plaintiff's Exhibit 4-I and 6-K1 which were in evidence (Tr. 73).

The District Court erred by refusing to submit to the jury a seperate claim form with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against plaintiff prohibited by Section 10(b) (Tr. 1049-1050-1054).

The District Court erred when the District Court stated that one of the reasons why He would not submit a seperate 10(b) claim form to the jury was that (Tr. 1052)(emphasis added) there were no losses shown when defendant Murphy was effecting securities transactions in plaintiff's account when defendant Murphy was not a registered representative.

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Plaintiff testified (Tr. 144) in reference to Plaintiff's Chalk Exhibit 11-A and 11-C that the Xerox transaction number 43 had reference to number 131 and that those two transactions went together (Loss of $44,032.90 is indicated on Plaintiff's Chalk Exhibit 11-C, the LOSS column marked for Identification).

Plaintiff informed the District Court (Tr. 668) that there was a loss of $44,000.00 in Xerox.

Mr. Thomas Staiti, Certified Public Accountant (Tr. 511) testified (Tr. 521) that the sale of Xerox on March 18, 1963 went with the purchase of June 1, 1964.

Plaintiff's trial attorneys informed the District Court (Tr. 521-2-3) that said transactions resulted in a loss to the plaintiff of $44,032.90 and that as a result of the order of the District Court (Tr. 1142) as to the manner in which losses were to be computed, the jury was given a figure of $4,850.00. Mr. Staiti testified (Tr. 522) and Mr. Lanigan testified (Tr. 743) that the loss was $4,850.40.

Mr. Staiti testified (Tr. 577-8) that the losses that he presented to the jury were not reflected on plaintiff's monthly statements.

Plaintiff informed the District Court (Tr. 678) that the jury were presented with fictitious losses.

CONCLUSION

For the reasons outlined in this Supplemental Brief, in addition to those expressed in the Petition, Reply Brief, and Memorandums, certiorari should be granted.

This Court has not yet acted upon my petition for a writ of certiorari.

Respectfully submitted

Norman A. Landry
2 Fairchild Drive
Holden, Massachusetts 01520
Pro se For Petitioner

SUPREME COURT, U. S.

FILED

FEB 12 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Norman A. Landry
2 Fairchild Drive
Holden, Massachusetts 01520

Pro se for Petitioner

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Respondents

PETITION FOR REHEARING OF ORDER DENYING
PETITION FOR WRIT OF CERTIORARI

Petitioner, Pro se, respectfully requests that this Court grant rehearing of its order dated November 5, 1973, which denied certiorari, and that the Court now grant certiorari. The petitioner received a time extension to file Petition For Rehearing to February 12, 1974. As grounds for this motion, petitioner states the following;

I. Petitioner's Difficulties With The Court Below And Attoneys

I realize that petitions are not likely to succeed, but this is an unusual case.

My trial attorneys refused to represent me during the critical ten day period following the judgement.

Despite the fact that the jury found defendants have wronged me and awarded substantial damages, the way in which the case was tried by counsel, the way in which the trial judge conducted the trial, and the grudging nature of the affirmance of the Court of Appeals have left me in a worse position than the wrongdoers.

Although both courts below concluded that I have been wronged, I have lost my home (Through deceit & chicanery, trial counsels purportedly purchased my home for $500, my home had no mortgage and was assessed for $32,540), my trial counsel informed me that they are charging me $350 per month rent, my trial counsel removed $3,070.60 which was in my savings account, my trial counsel have informed me that their charges are in excess of $30,000, and my trial counsel have informed me that they have a lien against the judgement. My trial counsel are charging me with attorneys fees and court costs even though I had won in the Federal court and even though I was informed that attorneys fees and court costs were to come from the court.

My trial counsel would not appeal the verdict and would not turn over my files to me.

My files contained materials from two Certified Public Accountants which I had paid $1,380 for, and my files also contained materials that I had paid $9,500 for to prior attorneys.

My wife has received mail from my trial counsel which is a form of harrassment. My wife was never a party to my action.

The harrassment has resulted in illness to me and my family.

The attorney that was suppose to represent me, subsequently would not represent me and now I am obliged to represent myself.

It is for these reasons as well as the reasons set forth on the following pages that I pray that the Court will reconsider my petition.

THE ISSUES ARE OF PUBLIC IMPORTANCE AS TO THE ADMINISTRATION OF JUSTICE

THE ISSUES ARE OF PUBLIC IMPORTANCE AS TO THE ENFORCEMENT OF THE FEDERAL SECURITIES LAWS FOR THE PROTECTION OF THE INVESTING PUBLIC.

THERE IS A CONFLICT BETWEEN THE CIRCUITS

II. THE DISTRICT COURT AND THE COURT OF APPEALS, IN REGARDS TO PLAINTIFF'S CHURNING CLAIM, IS DEPRIVING THE PLAINTIFF THE PROTECTION AND REMEDY AFFORDED UNDER SECTION 20(a) OF THE SECURITIES EXCHANGE ACT OF 1934

The Court of Appeals, in my case, state, in regards to the "churning" issue, in their Opinion (Pet., Appendix A, Page 100) (473 F.2d 373)(emphasis added):

"We now turn to plaintiff's contention that the district court erred in granting defendants' motion for judgement n.o.v. on his churning claim."

Facts - Nowhere in plaintiff's Brief on Page 75-8, Reply Brief on Page 26-8, and Petition For Rehearing on Page 14-5 (Pet., Appendix C, Page 120-2) which was before the Court of Appeals and is in regards to the plaintiff's churning claim, did the plaintiff ever contend that the court erred in granting defendants motion n.o.v. on his churning claim.

Plaintiff contended that the District Court erred in refusing to instruct the jury, on plaintiff's requested instructions, which would have made defendants liable jointly and severally to the same extent, in conformity with the evidence and with Section 20(a) of the Securities Exchange Act of 1934.

The Court of Appeals, in my case, state, in regards to the "churning" issue, in their Opinion (Pet., Appendix A, Page 100) (473 F.2d 373) (emphasis added):

"While we accept the jury's apparent conclusion that defendants exercised the necessary control over plaintiff's account, we are nevertheless convinced that there was insufficient evidence to support a finding that the account had been overtraded. We therefore affirm the decision below on this issue."

Facts - There was established a preponderance of evidence that plaintiff's account was overtraded.
Plaintiff testified (Tr 187) that his salary, during the period of complaint, had a range between $15,000 and $25,000.
Defendant Murphy testified (Tr 903-4) to securities transactions he effected in plaintiff's account when Murphy was not a registered representative.
Defendant Winchester testified (Tr 606) that Murphy was receiving commissions when Murphy was not a registered representative.
To have allowed defendant Murphy to effect securities transactions in plaintiff's account when he was not a registered representative, all with the approval of defendants Winchester and Hemphill, Noyes

all in violation of the Rules of the New York Stock Exchange, indicates crystal clear that the defendants purpose was to derive profits for themselves while disregarding the interest of the plaintiff.
Defendant Winchester testified (Tr 867), "You don't turn away business".
Defendant Winchester testified that he works on a bonus based on commissions of the Worcester house and that in order to be some volume, there has to be a lot of transactions within an account and in many accounts (640,695-7).
There was uncontroverted testimony that there was a total transactions of $1,200,000 or $1,210,000 in plaintiff's account from January 1962 to the end of May 1964.(Tr146)
Defendant Murphy testified (Tr 964) that he didn't have to make inquiries as to plaintiff's financial affairs.
Mr. Shwartz, from S.E.C., testified that the defendants over extended credit in plaintiff's account on fourteen different occasions.
The above, is only some of the evidence in regards to churning. Plaintiff's Brief before the Court of Appeals not only includes the above but also indicates much more.

As indicated in documents (Brief, Reply Brief and Petition For Rehearing),

that was before the Court of Appeals, "The District Court granted defendants motion for judgement notwithstanding the verdict on plaintiff's "churning" claim, not because the plaintiff's account was not "churned" in violation of the Federal securities laws, but because the District Court (Appendix, Page 250d) had reservations as to whether the liability should have been jointly and severally.
The District Court erred in refusing to instruct the jury of plaintiff's requested instructions Nos. 4, 5, and 6 (Appendix, Page 236) which would have had the effect of making defendants liable jointly and severally to the same extent in conformity with Section 20(a) of the Securities Exchange Act of 1934.

During the trial, after plaintiff's case rested, there were some papers filed (Tr 722) and according to the court docket, on date of Mar. 5, 1971 (A 14) it was a motion for defendant Winchester for a directed verdict, which was denied. After defendants rested their case, there was a request, made orally, for a directed verdict for Winchester in regards to the churning claim (Tr 1042) and after argument, was denied (Tr 1083)(A 14).

The Court of Appeals, in their Opinion, state (Pet., Appendix A, Page 100) (473 F.2d 373):

"We base this conclusion on plaintiff's uncomplaining acceptance of what was done for him by defendants over a twenty-two month period"

Facts - Plaintiff testified (Tr 339) that a letter of complaint was sent out on May 18, 1964 and that on May 21st plaintiff received a telegram demanding $37,000 and that subsequently plaintiff's entire account was liquidated by defendant Hemphill, Noyes.

Defendant Murphy testified that he received the complaint in May, 1964 (Tr 978).

Plaintiff's letter of complaint of May 18, 1964 was before the District Court and the Court of Appeals and is indicated in the Appendix, Page 179. Said letter complained about excessive trading in plaintiff's account by the brokerage firm.

The Court of Appeals, in their Opinion, state (Pet., Appendix A, Page 100-1) (473 F.2d 373) (emphasis added):

"It was uncontroverted that Landry regularly received confirmation slips and monthly statements from Hemphill, Noyes setting forth the full details of every transaction entered, etc."

Facts - Defendant Murphy testified (Tr 903-4) to securities transactions that he effected in plaintiff's account when he was not a registered representative, all with the approval of defendant Winchester (Tr 700).

Plaintiff testified (Tr 84) that defendant Murphy never indicated to plaintiff that Murphy wasn't a registered representative.

The confirmation slips and monthly statements, also did not show that the defendants were over extending credit to the plaintiff in excess of the limits permitted under the Federal securities laws.

Therefore, the defendants never gave the full details of every transaction as the defendants never informed the plaintiff that they were willfully flagrantly violating Rules of the New York Stock Exchange and Federal securities laws. This acted as a fraud on the plaintiff.

There was evidence that Chrysler was purchased in plaintiff's account on one day and the following day it would be sold (Tr 98).

Mr. Joseph Shwartz, from the S.E.C., testified that the broker was effecting securities transactions and treating them as a long sale and should have been treated as short, which is a violation (Tr 458-9).

In the case of Hecht v. Harris, Upham & Co., 430 F.2d 1204 (1970) the Court found, "Brokerage firm was properly held liable for churning of customer's account by representative on ground that it did not maintain an adequate system of internal control and that in failing to be diligent it had not acted in good faith. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a)."

Plaintiff's Request For Instructions (A 236, Par. 4, 5, 6) regards churning would have made defendants Winchester and Murphy liable jointly and severally to the same extent as defendant brokerage firm. The Requests are as follows:

"4. The churning of the plaintiff's account by the defendant, Hemphill, Noyes & Co. resulted in a loss to the plaintiff of all commissions paid by the plaintiff to the defendant corporation."

"5. The churning of the olaintiff's account by the defendant, Philip J. Murphy resulted in a loss to the plaintiff of all commissions paid by the plaintiff to Hemphill, Noyes".

"6. The churning of the plaintiff's account by the defendant Walter Winchester resulted in a loss to the plaintiff of all commissions paid by the plaintiff to Hemphill, Noyes."

The District Court refused to instruct the jury on Plaintiff's Requested Instructions 4, 5, and 6 (Tr 1061) and stated,

"They talk in terms of really a directed verdict".

A timely objection was made (Tr 1158).

This matter is now before this Court (Pet. 14, Par. 19).

The District Court gave to the jury separate claim forms (Under Rule 49(b), F.R.C.P.) in regards to the churning claim.

The jury found, through a preponderance of evidence, that defendants were guilty of churning plaintiff's account and returned a verdict against defendants as follows (A 239-41)(Tr 1161-2):

$5,000 against Hemphill, Noyes
$1,000 against Winchester
$500 against Murphy

As can be seen by the jury verdicts, the District Court did not instruct properly as the defendants were not held liable jointly and severally to the same extent for churning plaintiff's account.

Although plaintiff's trial attorneys were not allowed to withdraw after the trial (Tr 1164-5), the day following the trial, Mar. 11, 1971, plaintiff's trial attorneys sent the following letter to plaintiff:

"This office will not file either a motion for a new trial or take an appeal on your behalf. This letter is also notice to you that we have a lien for services on the total amount of the judgement and interest accrued on said judgement. The amount of our lien is one-third of the total interest plus cost".

Plaintiff sent a copy of this letter to District Judge Garrity on Mar. 19, 1971.

A copy of this letter is attached to a motion which petitioner filed with the Court of Appeals on June 19, 1971 and said letter is designated as Exhibit CR-2. The records have been transmitted to this Court.

On March 19, 1971, plaintiff sent a letter to District Judge Garrity which states, in part:

"Although you declined to permit them to withdraw from the case, they refused to represent me during the critical ten day period following judgement. As you know, I am not satisfied with the judgement or with the materials which went to the jury, I have attempted to retain other counsel but I have been informed that without a transcript it would be impossible to have counsel unfamiliar with the case to effectively vindicate my rights in the ten day period allowed by the Rules".

A copy of this letter is attached to a motion which petitioner filed with the Court of Appeals on June 14, 1971 and said letter is designated as Exhibit CR-1. The records have been transmitted to this Court.

A motion was filed for defendant Winchester, "Defendant Winchester's Motion For Judgement Notwithstanding the Verdict" (A 243-5) in regards to churning claim.

A motion was filed for defendant Hemphill, Noyes, "Defendants' Motion For Partial Judgement Notwithstanding The Verdict On Plaintiff's Churning Claim" (A 246-7).

Plaintiff, in writting, requested his trial attorneys to file a written response to the motions j.n.o.v.. Plaintiff's trial counsel refused to do so.